United States Court of Appeals

for the Second Circuit

APPENDIX

74-1243

United States Court of Appeals

FOR THE SECOND CIRCUIT

TRANS WORLD AIRLINES, INC.,

Plaintiff-Appellee,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants-Appellants.

APPENDIX

DAVIS & COX
Attorneys for Defendants-Appellants
One State Street Plaza
New York, New York 10004

CAHILL GORDON & REINDEL
Attorneys for Plaintiff-Appellee
Trans World Airlines, Inc.
80 Pine Street
New York, New York 10005

PAGINATION AS IN ORIGINAL COPY

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-1243

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Notice of Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

Notice is hereby given, pursuant to Rule 3 of the Federal Rules of Appellate Procedure, that the defendants Hughes Tool Company and Raymond M. Holliday hereby appeal to the United States Court of Appeals for the Second Circuit from the judgment entered in this action on the 14th day of April, 1970.

Date of Filing: New York, New York
May 5th, 1970.

Yours, etc.

DONOVAN LEISURE NEWTON & IRVINE

By /s/ JAMES V. HAYES
Two Wall Street
New York, New York 10005
732-4100

Notice of Appeal

CHESTER C. DAVIS, ESQ.

By /s/ CHESTER C. DAVIS
120 Broadway
New York, New York 10005
349-0660

Attorneys for Defendants
Hughes Tool Company and
Raymond M. Holliday

To:

CAHILL, GORDON, SONNETT,
REINDEL & OHL
80 Pine Street
New York, New York 10005
WHitehall 4-7400
Attorneys for Plaintiff
Trans World Airlines, Inc.

Order to Show Cause

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Upon the annexed affidavits of Calvin J. Collier, Jr., sworn to on May 4, 1970, and the exhibits thereto, and James V. Hayes, Esq., sworn to on May 5, 1970, it is

ORDERED, that the plaintiff show cause before the Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, at the United States Courthouse, Foley Square, New York, New York, in Room 506 on the 11 day of May, 1970, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order, pursuant to Rule 62 of the Federal Rules of Civil Procedure and Rule 33 of the General Rules of the United States District Court for the Southern District of New York should not be entered herein granting a stay, pending appeal, of execution of the judgment in the amount of $145,448,141.07 in favor of the plaintiff entered on the 14th day of April, 1970 (either without security, or in the alternative, upon furnishing security in the form of a lien on specific property having a value in excess of the amount of the compensatory portion of the judgment plus 11% and $250) upon the grounds that the posting of a bond or undertaking of the kind described in Rule 31 of the General Rules of the United States District Court for the Southern District of New York would work an undue hardship on the defendants.

Order to Show Cause

IT IS FURTHER ORDERED, that service of a copy of this order and of the papers on which the same is granted on the attorneys for plaintiff, Messrs. Cahill, Gordon, Sonnett, Reindel & Ohl, 80 Pine Street, New York, New York, on or before May 6, 1970, shall be sufficient service of this order, and, in the meantime, that all proceedings for execution of the judgment in favor of the plaintiff be stayed until ten (10) days after the determination of this application and the entry of an order thereon.

Dated: New York, New York
May 5, 1970.

/s/ CHARLES M. METZNER
United States District Judge

Affidavit of C. J. Collier, Jr.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF TEXAS,
COUNTY OF HARRIS, *ss.:*

C. J. COLLIER, JR., being duly sworn, deposes and says:

1. I am Vice President and Treasurer of defendant Hughes Tool Company ("HTCo") and make this affidavit in support of the motion of defendants HTCo and Raymond M. Holliday for a stay, pending appeal, of execution and of all other proceedings to enforce the judgment entered by this Court on April 14, 1970.

2. The judgment is in the amount of $145,448,141.07. Of this amount, approximately $45 million is for compensatory damages while the bulk of the remainder is a "penalty imposed by law" (Opinion of April 13, 1970, p. 17). The judgment has been described by this Court as an "unprecedented recovery—some 30 times greater than the next highest recoveries on record."(*Ibid.* p. 3)

3. Defendants have filed a Notice of Appeal. I understand that under Rule 62(d) of the Federal Rules of Civil Procedure and General Rules 31-33 of the United States District Court for the Southern District of New York a stay of proceedings to enforce the judgment pending appeal may be obtained as a matter of course by

1. Depositing with the Clerk of the Court cash or government bonds in an amount equal to 111% of the amount of the judgment plus $250, which in this case would amount to $161,447,686.59, or

2. Furnishing the undertaking or guaranty in such amount of a corporate surety holding a certificate of authority from the Secretary of the Treasury, or

3. Furnishing the undertaking or guaranty in such amount of two individual residents of the Southern or Eastern Districts of New York, each of whom owns property within such districts worth double the amount of the undertaking over and above all other debts and obligations.

The third alternative is obviously unsuited to a judgment of this size. For the reasons set forth below it is not feasible for defendants to furnish the other types of security described above.

4. Defendants cannot deposit cash or government bonds in the amount of $161,447,686.59 without costly liquidation of assets or without undertaking a major costly and time consuming financing program. I do not believe that any business enterprise in this country could do so.

5. In connection with the above it may be noted that Hughes Air Corp., 78% owned by HTCo, recently completed the acquisition of the assets and business of Air West for a cash purchase price of approximately $90,000,000, pursuant to a commitment to do so entered into by HTCo prior to the Report of the Special Master

herein, and that HTCo has an obligation in the public interest to provide additional financial assistance to that airline in the future. In its order dated July 15, 1969, the Civil Aeronautics Board stated that:

> "... the public interest clearly requires approval of the acquisition (of Air West by HTCo) as the only means of assuring the continuation of Air West's service; that without the financial support of (HTCo), Air West would be forced to suspend its operations; that the severe repercussions which would result from suspension of operations could be justified only if it were established that the transactions were inconsistent with the statutory standards of the Act; and that the transaction is consistent with the public interest and not inconsistent with the statutory standards . . ."

The Board also found that without the financial support of HTCo, Air West would collapse and that such collapse would have severe repercussions in that Air West is one of the largest local service airlines, carrying over 500,000 passengers annually in about 360 markets, with approximately 3,200 employees.

6. Defendants have investigated the possibility of obtaining a supersedeas bond in the amount of $161,447,686.59 from a number of surety companies and have ascertained that it is impossible to obtain such a bond from any surety company or group of surety companies unless the bond is fully secured through a deposit of collateral in the form of cash or government bonds or other security of similar liquidity. Letters from Mr. H. Marshall Frost, President

of Seaboard Surety Company, and Mr. James Wells, Vice President of the Fireman's Fund American Insurance Companies, attached hereto as Exhibits A and B, evidence the uniform response which defendants have received from surety companies.

7. To require HTCo to engage at this time in severely disruptive and time-consuming liquidation of assets would impose unreasonable burdens on the conduct of the business of HTCo and would be tantamount to the imposition of an additional penalty and an unreasonable limitation on its right to appeal. Such a penalty would be particularly unjust in view of the fact that more than two-thirds of the judgment represents a penalty.

8. A letter dated April 17, 1970 from Haskins & Sells, certified public accountants who have audited HTCo for more than 30 years, is attached hereto as Exhibit C and shows that as of such date HTCo had a net worth in excess of $500,000,000 before provision for the contingent liability represented by this judgment. I know of no transaction occurring since April 17, 1970 or now contemplated which would materially affect HTCo's net worth. The fact that HTCo's net worth is three times greater than the amount of the judgment should provide ample assurance that, in the event of an affirmance, plaintiff would be able to obtain satisfaction of the full amount of its judgment even though no security is provided at the present time.

9. In the event, however, that the Court determines that it is just and reasonable under the circumstances for plaintiff to be furnished security in an amount representing the

compensatory portion of the judgment as distinguished from the amount awarded as punitive damages, HTCo would be able to provide a lien on specified property having a value in excess of the amount so determined.

10. Under the circumstances here present and in view of the unprecedented magnitude of the judgment entered by this Court, only one-third of which is compensatory and the remainder of which is punitive, it is respectfully requested that this Court stay execution thereon pending appeal without requiring defendants to furnish security or, in the alternative, upon their furnishing security in the form of a lien on specific property having a value in excess of the amount of the compensatory portion of the judgment plus 11% and $250.

/s/ C. J. Collier, Jr.
C. J. Collier, Jr.

(Sworn to May 4, 1970)

Exhibit A Annexed to Affidavit of C. J. Collier, Jr.

SEABOARD SURETY COMPANY

90 WILLIAM STREET, NEW YORK, N. Y. 10038

H. MARSHALL FROST
PRESIDENT

April 16, 1970

Hughes Tool Company
Humble Oil Building
Houston, Texas

Attention Mr. Raymond Holliday

Re: TWA vs HUGHES TOOL COMPANY
U. S. District Court
8th Circuit: District of New York

Gentlemen:

You have made inquiry as to the availability of a Supersedeas Bond in the amount of $161,000,000 on behalf of Hughes Tool Company in connection with the above matter.

Despite the most obvious financial responsibility and quality of the Hughes Tool Company, the Seaboard Surety Company and, I believe, any other company, would be unable to furnish a bond of this size unless completely secured through the deposit of collateral: either cash or government bonds or documents of similar liquidity.

Sincerely,

/s/ H. M. FROST
H. Marshall Frost

HMF:ef

Exhibit B Annexed to Affidavit of C. J. Collier, Jr.

FIREMAN'S FUND AMERICAN INSURANCE COMPANIES
3333 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94120

JAMES H. WELLS
VICE PRESIDENT

April 15, 1970

Mr. Raymond M. Holliday,
Executive Vice President
Hughes Tool Company
Houston, Texas

Subject: TWA vs. Hughes Tool Company
U.S. District Court—Southern District New York
Supersedeas Bond Approximately $160 Million

Dear Mr. Holliday:

This letter will confirm our recent discussion as to the ability of our company to arrange a Supersedeas or Appeal Bond in an amount approximating $160 million in connection with this court action.

An obligation in this amount and of this type is a most unusual one and presents very real practical problems. It is, of course, possible that the principal or surety may be called upon at some future date to pay on short notice this amount of cash in satisfaction of the judgment. Therefore, it is our considered opinion that the only possible way we could arrange such a bond would be on condition that your company arrange to deposit with us collateral in the form of cash or readily marketable Government securities in the full amount of the bond.

Exhibit B Annexed to Affidavit of C. J. Collier, Jr.

This feeling on our part should not be considered as an adverse reflection on the financial strength or integrity of your company, but is dictated by the practical reason that we do not have this amount of cash immediately available without liquidation of a substantial quantity of our securities which might be required under adverse market conditions. This represents the opinion of our company; however, we believe that you would encounter a simliar reaction from any other surety company or companies.

If we can offer further assistance in connection with this matter at any time, please feel free to contact us.

Very truly yours,

/s/ James H. Wells
James H. Wells
Vice President

Exhibit C Annexed to Affidavit of C. J. Collier, Jr.

HASKINS & SELLS

CERTIFIED PUBLIC ACCOUNTANTS

1200 TRAVIS

HOUSTON 77002

April 17, 1970

Hughes Tool Company,
Houston, Texas.

Dear Sirs:

We have previously made an examination of the financial statements of Hughes Tool Company for the year ended December 31, 1968, and rendered our report dated April 30, 1969 thereon. In that report we state that, in our opinion, except for an understatement of one asset (correction of which understatement would improve the financial position), and subject to the effect of payments, if any, which may be required as a result of damages claimed in a then pending lawsuit filed by Trans World Airlines, Inc. against the Company in the United States District Court for the Southern District of New York, such financial statements present fairly the financial position of the Company as of December 31, 1968 in accordance with generally accepted accounting principles.

Such financial statements show that stockholder's equity as of December 31, 1968, without provision for payment of damages claimed by Trans World Airlines, Inc., was in excess of $500,000,000.

We are presently making an examination of the Company's finanical statements for the year ended December 31, 1969. We expect to complete our examination about

Exhibit C Annexed to Affidavit of C. J. Collier, Jr.

May 31, 1970, but at this time we have not completed all of the auditing procedures we consider necessary to enable us to express, and we do not express, any opinion on financial statements of the Company as of that date. However, such auditing procedures that we have carried out did not bring anything to our attention which causes us to believe that since December 31, 1968 the stockholder's equity referred to above (without provision for payment of damages claimed by Trans World Airlines, Inc.) has been reduced to an amount which is not in excess of $500,000,000.

This letter is solely for the information of the Company and Trans World Airlines, Inc. and is not to be quoted by excerpt or reference to any other organizations or persons, except for Courts of the United States of America in which the lawsuit referred to above is being heard.

Yours truly,

/s/ Haskins & Sells

Affidavit of James V. Hayes

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

JAMES V. HAYES, ESQ., being duly sworn, deposes and says:

1. I am a member of the firm of Donovan Leisure Newton & Irvine, one of the firms of attorneys for defendants Hughes Tool Company and Raymond M. Holliday in the above-entitled action. I make this affidavit in support of defendants' application for a stay of execution of the judgment entered on April 14, 1970 in favor of the plaintiff (such stay to be granted either without security, or, in the alternative, upon furnishing security in the form of a lien on specific property having a value in excess of the amount of the compensatory portion of the judgment plus 11% and $250). This application is brought on by an Order to Show Cause because the stay of ten (10) days, granted by this Court on April 29, 1970 upon its disposition of defendants' application for clarification and amendment of the judgment, will expire on May 11, 1970. Expiration of the period without consideration of this application would cause defendants irreparable injury.

2. Defendants have filed a notice of appeal in this action to the Court of Appeals for the Second Circuit because

substantial and meritorious questions exist which should be presented for determination by the Court of Appeals. The decisions of this Court ordering a default judgment, confirming the report of the Special Master and awarding an attorney's fee, all raise questions of substantial merit and great importance which should be presented to the Court of Appeals for review and determination.

3. As more fully appears from the affidavit of Calvin J. Collier, Jr., it is not possible for defendants to post the kind of security contemplated by the local rules. By reason of the financial soundness of the Hughes Tool Company, moreover, plaintiff is fully protected. Unless a stay is granted without requiring defendants to post security as provided in the local rules, the right of defendants to appeal may be impaired. Defendants should be permitted to have the Court of Appeals consider the substantial and meritorious questions presented by the appeal in this action.

4. No previous application for the same or similar relief has been made in this action.

/s/ JAMES V. HAYES
James V. Hayes

(Sworn to May 5, 1970)

Transcript of Proceedings
May 11, 1970

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Before:

HON. CHARLES M. METZNER,
District Judge

New York, May 11, 1970
10:15 a.m.

APPEARANCES:

CAHILL, GORDON, REINDEL & OHL, ESQS.,
Attorneys for Plaintiff,
By: DUDLEY B. TENNEY, ESQ.,
PAUL W. WILLIAMS, ESQ., and
MARSHALL H. COX, JR., ESQ.,
of Counsel

DONOVAN, LEISURE, NEWTON & IRVINE, ESQS.,
Attorneys for Defendants, Hughes Tool Co., and Raymond M. Holliday
By: JAMES V. HAYES, ESQ.,
MAHLON F. PERKINS, JR., ESQ., and
DAVID A. WIER, ESQ.,
of Counsel

[2] DAVIS & COX, ESQS.,
Attorneys for Hughes Tool Co.,
By: CHESTER C. DAVIS, ESQ., and
LOLA S. LEA, ESQ.,
of Counsel

Transcript of Proceedings, May 11, 1970

The Court: All right, Mr. Hayes, it's your motion.

Mr. Hayes: Yes, your Honor.

You are acquainted with the nature of the motion and there is really very little I intend to say to you in connection with it. This, as your Honor, has already noted, is an extraordinary judgment, 30 times the size of the largest prior recorded judgment. And there is something else rather extraordinary about it too.

I know of no case that's ever been decided in which the accounting changes made by a plaintiff three years after the last act of which complaint was made, entered into the judgment, and the accounting changes alone represent $37 million out of the total judgment or eight times the amount of any prior recorded judgment.

So it's unprecedented on two scores. If this judgment were like other judgments, we wouldn't be here; if it were like any prior recorded judgment we wouldn't be here.

[3] The Court: Like Hanover Shoe.

Mr. Hayes: Like Hanover Shoe. Thank you for mentioning that because I try to impress my colleagues with that, so far without success.

And it is our position that the extraordinary situation presented here requires extraordinary treatment by the Court.

Now, plaintiff's position, as I understand it from their memorandum, is that they should have security in the form of the rules, and what they really mean, when one reads Rule 31, is that it should be either cash and securities or a bonding company bond in the amount of 111 per cent and so on.

They make no mention of the third alternative presented by Rule 31, which is a most interesting alternative, it seems to me, and that is a guarantee by the two individuals

resident either in the Southern or Eastern District of New York, each of whom is worth twice the amount of the judgment over and above any other liabilities or any other commitments.

I suppose I do not need to try to persuade your Honor that two such individuals have not been uncovered up to now, each of which is worth 320-odd million dollars over and above all other liabilities. But the interesting thing [4] about that third alternative is that their worth is not necessarily liquid worth, it's in real or personal property. Both are considered in determining their worth.

Now, that obviously would not be a deposit of securities, it would not be a bonding company bond. I think it's safe to say that when the rules were adopted here, nobody envisioned the type of security that should be put up by anybody for a judgment of this size. As I read the plaintiff's memorandum, they do not dispute the power of the Court to make a just arrangement. Their claim really is that the Court's discretion, whatever it may be, and that is not spelled out in the memorandum, just shouldn't be exercised in this case.

We might submit that it should be and for these reasons:

The net worth of the Tool Company is in excess of three times the amount of the judgment. That certainly should enable payment of the judgment, if it should be affirmed.

The case, of course, is now on appeal and maybe I should say in passing that the $250 bond has been put up.

The Court: I saw that. I have it here.

Mr. Hayes: We believe, and even though your Honor has decided all questions against us, that the case [5] presents to the Appellate Court important, radically important, basic questions. Those are now in the lap of the Court of Appeals.

In short, what we are saying, and your Honor does not have to agree with us in this, though I believe your Honor may well recognize it, is that we believe that the questions we have raised, and will raise on appeal, do not lack merit.

In short, in the light of the net worth of the Tool Company, which is more than three times the amount of the judgment, and not quite the four times the amount of the judgment defined to individuals as I described before and in the light further of the very grave questions that are presented in this case, the Court should exercise its discretion to fashion an appropriate protection for the plaintiff.

Now, that does not mean, it seems to us, a bond of cash or securities or a surety company bond, the first two alternatives under Rule 31; rather, it means that the Tool Company's net worth could stand in place of the two individuals whom we have not yet been able to discover.

Now, that is the substance of our position, your Honor.

The Court: Mr. Tenney?

[6] Mr. Tenney: Well, your Honor, I think our position is very clear in our memorandum. We think under the cases and as we read the rules that the discretion, if any, that your Honor has here is certainly a very limited discretion. The cases from the foundation of the court system and most of the early ones, of course, the Supreme Court cases, have been perfectly clear that a supercedence wouldn't issue unless the plaintiff was protected, and in the case of a money judgment, there has been no dispute as to how you protect the plaintiff; you protect it by a proper bond in an amount in excess—and how much in excess may be in issue—but in excess of the judgment.

The disputes that occurred in the Nineteenth Century and after that dealt with things like mortgage foreclosures

where you were going to get the land back and how much extra bond you should have.

The case law on money judgment is super-simple. As far as I know there certainly has never been a case that went any other way.

Now, your Honor, if you look at Rule 31 which Mr. Hayes is concentrating on, of the general rules of this court, that describes how a sufficient bond in a sufficient amount, the amount would be 111 per cent under Rule 33, of the judgment, but how a sufficient bond—what I should [7] say it consists of—yes, cash, securities, yes, proper surety companies, and the net worth of two individuals, perhaps, bonds that is by individuals with net worth each twice as much as the amount of the judgment, it doesn't say anything about the net worth of the defendant.

Now, that's rather significant. It has to be individuals not subject to the judgment whose responsibility I think your Honor would feel was a proper thing to go into, what kinds of individuals are they, for example, I think historically that has been a proper subject of examination when individual bonds are put up, and the net worth of the defendant is not suggested any place in that rule or in any other rules as far as I know as a significant matter.

The point is that judgment—the defendant may not pay the judgment. The defendant's present net worth may not continue to exist.

The Court: How do we take care of that? I don't see how you can call upon the defendant under these unusual circumstances to put up a bond in the amount you want. How can it be done?

Supposing you represented Tool, what would you do, sell everything on the open market to bond this?

Mr. Tenney: No doubt about it, I would have [8] started it in December, if not earlier. We outlined it in

our memorandum. A company that has a net worth of over $5 million were told by a letter from a firm of accountants, not by any affidavit of a responsible officer, but a company like that, on a proper disclosure to lending institutions, can arrange for a loan, can arrange for an advance of credit, can arrange for money with which to buy securities to put up the securities or to buy securities collaterialized a surety company loan.

The Court: Do you want me to stay the discussion of this judgment until they can arrange that?

Mr. Tenney: There is nothing short of that that I can see that would be full protection for the plaintiff which we think we are entitled to. We don't think that they are entitled to a further stay because they should have been doing this at least since December.

The Court: Let's forget that, Mr. Tenney. I won't buy that.

Mr. Tenney: All right, sir. If that is what they should do then and if they take time there should be a limited period of time within which to do it and they should in the meantime do several things. It seems to me a natural thing to expect would be a guarantee by the 100 per cent stockholder, subject himself to the jurisdiction [9] of the Court in case he did not live up to that guarantee. That 100 per cent stockholder certainly is worth four times the amount of this judgment.

There should be some specific—

The Court: Why don't they put up the State of Nevada as security, that would take care of it.

Mr. Tenney: I don't follow how we can use the State of Nevada.

The Court: You can elect a governor or a politician, a senator.

Mr. Tenney: Then there should be at the very least some words to the Tool Company forbidding them to dissipate their assets.

The Court: This I would agree with.

We will discuss that.

Do you have a third alternative before we come back to Mr. Hayes?

Mr. Tenney: I can think of nothing else, sir.

The Court: Mr. Hayes, what about those two?

Mr. Davis: Your Honor, we have discussed with—

Mr. Hayes: Maybe I should say that Mr. Davis has been doing most of the groundwork here rather than I. Pardon me.

The Court: All right, Mr. Davis.

[10] Mr. Davis: On the possibility of arranging in effect a loan commitment, the difficulty is, if we follow the standards heretofore applied under supersedeas bond, there is no way you can tell anybody when the judgment will become payable, no way of estimating the time; we can estimate the time when we think the matter will be submitted to the Court, we cannot estimate when the Court will render a decision, and no institution says that they are prepared on demand to come up with that much money. That's been the problem also with the so-called bonding company, quite apart from having to form some kind of consortium because no one institution is in a position to come up with that amount of credit, no bonding company can by itself, so what we run into when we did discuss with various lending institutions and bonding companies what the situation would be in the event that we failed to get some relief from the Court, what we run into is a problem that nothing can be worked out unless we start giving them dates as to when the money will be required,

some estimate that they could rely upon, otherwise they say we just don't keep that kind of cash around, we, in order to make that kind of money available to you, we have to undergo some kind of liquidating process, and we in turn would have to go to the process of developing a plan of liquidation to meet the judgment.

[11] If the judgment was payable today, assuming we had gone through the appellate period, we obviously would have to come to the Court for some rational period of liquidation in order to pay the judgment. No question that we have the assets with which to pay the judgment even of this amount since the net worth determined is based upon original cost or original cost less depreciation with respect to depreciable property.

But there is a lack of feasibility in attempting to work out any kind of financing arrangement with the unknowns that exist with respect to when the appellate period will be over and how much time will they have after the appellate period is over in order to come up with the amount if it should become payable and those are the things which have made it impossible to discuss intelligently with any lending institution or bonding company, the possibility of putting up that amount with the kind of a supersedeas bond which is described in Rule 31.

The Court: What about a method of preventing Tool Company from dissipating its assets so the net worth goes below a half million dollars?

Mr. Davis: I think it would be reasonable to ask the Tool Company to permit a loan [*sic*] (lien) to be placed upon property and my approach to that was to deal with property [12] which was non-movable such as real estate, and permit a lien to be placed on it so it could not be dis-

posed or transferred to anyone except subject to the lien and on some rational basis arrive at the value of that property.

Obviously we are not here or not suggesting we should undergo a valuation proceeding which is not satisfactory to anyone. I discussed with the client and with Mr. Hayes the possibility of taking some arbitrary basis evaluation in the sense of saying, well, if property acquired within the past several years presumably has a value of its cost of acquisition and we could give a certificate of Haskins & Sells, that property on which a lien is to be placed had an original cost in excess of some amount.

That kind of an approach is obviously feasible, but it is not feasible if someone is going to suggest, oh, no, we must have an evaluation proceeding. But, as I say, taking an approach such as the one I have indicated, to me is a feasible approach.

The Court: They have a balance sheet showing a $500 million net worth with a listing of assets. Is there any provision to be worked out that none of those assets shall be disposed of during the pendency of the appeal?

Mr. Davis: I think we can identify and describe [13] assets that would not be disposed of during the pendency of the appeal without further approval of the Court or something. Obviously you can't deal with inventories. Again, I mean there is no problem, as I say, in taking the tangible real estate, improved or unimproved, which has admittedly by any standards a value substantially in excess of the value of the amount and we could freeze it by commitment not to dispose or permitting a lien to be placed on it.

Mr. Tenney: If a bank or some other lending institution were to lend money, furnish its credit, did other things that involve the kind of thing that the defendant is asking the

plaintiff here, for a substantial amount of money, that lending institution would expect and would get certain things. It would get detailed financial statements, certified detailed financial statements, certified at least annually by an outside auditing firm and at least quarterly by the responsible financial authorities of the defendant. It would have similar certificates by responsible officers of the defendant as to certain things, such as, net worth, maintenance, such as compliance with other restrictions. It would certainly also in this particular situation, expect and get some kind of agreed to regulation, of transactions between this corporation and its 100 per cent stockholder.

[14] Now, it seems to me that when Mr. Davis says this sort of thing he outlines could be done, reasonably he is talking about something quite different from what seems to me any lending institution or any outside party would expect. He is also talking in a context here, an adversary context, where the kinds of discussions that you could expect across the table between a borrower, an anxious borrower and a willing lender, what are these values, what kind of certificates can we give you, what kind of restrictions can we place on ourselves. I am perfectly prepared to recognize, for example, the Tool Company cannot put a lien on its inventories, it's a business concern. That's a problem that in a negotiation one settles between a willing borrower and a willing lender.

How can we settle that sort of thing without coming back to your Honor constantly over disputes? It seems to me and I won't take long on this one, it seems to me what they ought to do is make their arrangements with people that they can discuss this sort of thing with privately, that can furnish them with money or their credit with which then they can come up in a non-controversial sort of way

and provide the plaintiff the security the rules contemplate. If they are not to do that, then it seems to me to try to meet Mr. Davis' suggestions, and this is by a long way it seems to me [15] a less satisfactory approach, they should be required to give us—and by us I mean TWA—the kind of security TWA needs at some—by some designated time in the future, and we can approach the problems that Mr. Davis is talking about at that level, what kind of assurances do they need in order to meet the questions that have been raised by the bonding institutions.

He suggests that the lending institutions say when is the money needed? Well, as of right now, the commitment should have been given sometime ago. It should be a date—a date could be fixed by which it should be obtained. A provision could be made. I think that TWA could reasonably give a commitment that after a disposition, final disposition of the case, there would be a period of time. That commitment could be made right now. Six months or something like that.

The Court: You mean after the judgment becomes final, the defendant shall pay the judgment based on a commitment six months after that date, which would give the financial institutions a sufficient time to get the money together?

Mr. Tenney: That sort of thing, your Honor. That's the problem of the financial institutions, which, of course, have access to knowledge about Tool Company which we will never have.

[16] The Court: Can we send them back to the insurance companies who are the additional defendants?

Mr. Tenney: There are others than those insurance companies—I think those insurance companies I think are business institutions and for proper security in a proper

case would be glad to lend money to anyone for a fee. They would have, of course, with proper security, proper arrangements.

Now, a time period can be fixed in which they are to accomplish that, and in the meantime your Honor could place upon the defendants a degree of restriction that perhaps might not seem unreasonable over a period of years, such as a direction that there should be no dividends or other distributions, directly or indirectly to a hundred per cent stockholder, put a dollar limitation on it so they can—

The Court: I don't know what he needs to live on.

Mr. Tenney: They can suggest a figure, your Honor. I don't think that's really a problem.

—direct that the Tool Company should not within the limited period of time undertake any transactions not in the ordinary course of business or dispose of any assets other than for fair value.

Your Honor, it's difficult to try to frame right [17] here the kinds of retractions that it seems to me are called for, but I think they should be quite strict for a limited period of time within which they can make arrangements that would relieve us of this problem of the plaintiff with the Court having a problem of supervision of others like this over a period of perhaps a couple of years. I still think to put up the bond would be the easier way.

The Court: Do you want to say something, Mr. Hayes, while Mr. Davis is recovering?

Mr. Davis: I think I am recovered enough to—

Mr. Hayes: I want to say one thing which I forgot to mention: Mr. Tenney talked about the Tool Company has had a lot of time here to get ready for this, it is not in our affidavit but I would make a statement to you as a

lawyer in the case: promptly upon filing of the special master's report, we began our office negotiations with bonding companies and ran into the very problem that Mr. Davis has outlined to your Honor. It is just impossible to get it from a bonding company because they are in a situation where they have to be able to pay cash on the nose or they lose their license to operate.

The Court: Well, supposing you take Mr. Tenney's suggestion that your commitment read, and if that were a commitment acceptable to the plaintiff I would take it, [18] that the money must be produced within 30 or 60 days after the entry of the judgment.

Now, that gives the lender, I think he is the lender, sufficient time, two months should be sufficient time for him to meet whatever commitments or whatever consortium might come up. And I think—would that be agreeable to you, Mr. Tenney?

Mr. Tenney: Yes, your Honor, it would be.

The Court: If you had the commitment of responsible lenders, I mean.

Mr. Tenney: Yes, sir, that would be acceptable.

The Court: That within 30 or 60 days whatever—he will want the greatest period of time he can get, the plaintiff will want the shortest, we will work something like that out but it seems to me that then your lender knows he has a two month period in which to meet an obligation. That's not outlandish.

Mr. Davis: It's a question of discussing it with lending institutions who don't want to move—are unable to make a decision because they say it depends upon the group we have to put together.

The Court: I have no doubt that there has to be a consortium.

Transcript of Proceedings, May 11, 1970

Mr. Davis: The question this raises they say, well, it depends on what it is that will have to be [19] liquidated, what the conditions will be, you can't get an underwriting house today to get themselves on the hook for any more than 24 hours. They want out. They want out no matter what you got, no matter what you do, we don't know there could be a war break out, something happens, it's the intangible aspect of a point of time in the future which cannot be pinpointed.

It's a problem of discussing with them, well, what is it that we would have to liquidate, and to intelligently discuss.

I haven't had any of those discussions because up to now there was no basis for knowing whether or not this was in the cards or not. There is no reason why I should not have those kinds of discussions with lending institutions and discuss with them that approach. But just based upon my own personal experience in connection with financial underwritings I am sure Mr. Tenney is equally familiar more so than I; we know it's not easy because they talk about the money market, they talk about the interest rates, they talk about the charge, all of which in the last analysis is going to come out, well, of somebody's pocket in the event we are successful in a substantial change in the result, and looking at it from a point of view of what is it that TWA is entitled to today, versus what it could be entitled to [20] tomorrow, it seems to me that in the last analysis what is available to pay the judgment is going to be what is available with which to pay the judgment which it takes 30 days to liquidate, 60 days or 90 days or whatever it does, and that's why, in my own thinking at least, that of giving them an effective loan which prevents the property from being disposed, or gives them all the se-

curity they could possibly gain, there is nothing that they gain by—there is no benefit to TWA by imposing an additional financial burden upon us at this time by paying a commitment fee or trying to agree upon those things, it's a risk they take in the event of a reversal in whole or in part, and I frankly have difficulty in seeing what is effectively accomplished.

When you look at the situation today, and assuming that there were no case for the purpose of discussion, I think it is well known, I could tell you as a fact that the Tool Company has the minimal assets within this jurisdiction, and as they recognize, I think at one point in their memorandum, the fact that there are no assets, they don't have at the present time actually a basis for levying discussion, which is what they are talking about. Because under the—I understand it under the rules, under the Federal Rules, at any rate, the right to levy discussion outside of the jurisdiction is dependent upon the judgment having become [21] final. But be that as it may, whatever it may be, it seems to me that if we approach it in a simple manner which is that of giving a lien of property, they can never have any more than that, the property will be there with their liens to levy discussion upon to the extent to which they have a right to levy discussion when that day comes.

The rapidity with which discussion may be levied upon it depends, it seems to me, upon the circumstances which would then exist, even assuming they would be done under the umbrella of a reorganization if anybody forced the issue, if they felt at that time that the liquidation was not taking place expeditiously, so as a practical matter, while there is no reason why we should not explore the possibility being suggested, my personal experience and based upon the conversations I have had, is that I can take the time

to do it, and we can report back to the Court on the results of those conversations, what we will probably run into, and perhaps by going to them and saying, well, now, isn't there some way where you can give a firm commitment now? We happen to be in a tight money market right now.

The only thing I know the bonding companies have said, including one which says, we have got $800 million of securities but man, we wouldn't think, we wouldn't dream of entering into an arrangement which required us to liquidate [22] all this in 30 or 60 days in order to come up with—we were then talking about $150, $160 million. We just are not interested.

The Court: Well, Mr. Tenney says when you get into the area of putting a lien on property, you made him a policeman and that shouldn't be his function. I think that's your position, isn't it, Mr. Tenney?

Mr. Tenney: I think so, a policeman after the thing is entered into.

The Court: I didn't think he should be a policeman.

Mr. Davis: I don't follow the policeman concept.

The Court: You say we are going to give you properties, he has to go out, investigate the properties, see if there are any liens on it, he gets involved in checking on your security and that isn't the plaintiff's problem or the winning party's problem under the supersedeas bond theory. It's your problem.

I will tell you what I will do. I will put this off for ten days. In the meantime you make those inquiries. Let's fix a date.

This is May 11th—May 20th, 10 o'clock here in chambers. Look into it. In the meantime the stay will be continued but we are going to have to resolve it [23] on May 20th one way or the other.

Transcript of Proceedings, May 11, 1970

Mr. Tenney: May I add one matter which may be helpful, I don't know, Mr. Davis.

When Mr. Davis speaks of the Tool Company giving to TWA a lien on its properties or some properties and says that when the judgment is ultimately payable there will only be two companies net worth to pay it out of and what has TWA to worry about, it will just be the same properties, your Honor, if it were a lender or something of that kind, they might ask for and get, for all I know, under these circumstances, sort of a corporate mortgage on all of the properties rather than just what the borrower mentions.

The Court: What he is telling me now I think that Mr. Davis in addition to doing the talking to the other side I think you and Mr. Hayes have to be in touch with Mr. Tenney so when you come back here on May 20th he doesn't hear for the first time what your proposals are.

In other words, these conversations not only involve your seeing what you can do on your side but actively talking with Mr. Tenney to see if you can come up with some arrangement. I don't want you to come back here on the 20th and put something on the table that he hasn't heard before and have the whole ball of wax going again.

Mr. Hayes: In chambers on the 20th.

[23a] The Court: Yes.

Mr. Hayes: Thank you, your Honor.

Transcript of Proceedings
May 20, 1970

UNITED STATES DISTRICT COURT
SOUTERN DISTRICT OF NEW YORK
61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

—vs.—

HOWARD W. HUGHES, HUGHES TOOL CO.
and RAYMOND M. HOLLIDAY,

Defendants.

Before:

HON. CHARLES M. METZNER,

District Judge.

APPEARANCES:

CAHILL, GORDON, REINDEL & OHL, ESQS.,
Attorneys for Plaintiff,
Dudley B. Tenney, Esq.,
Marshall H. Cox, Jr., Esq. and
Michael P. Tierney, Esq., of Counsel.

DONOVAN, LEISURE, NEWTON & IRVINE, ESQS.,
Attorneys for Defendants
Hughes Tool Company and
Raymond M. Holliday,
James V. Hayes, Esq.,
Ralstone R. Irvine, Esq. and
Mahlon F. Perkins, Jr., Esq., of Counsel.

[2] DAVIS & COX, ESQS.,
Attorneys for Hughes Tool Co.,
Chester C. Davis, Esq. and
Lola S. Lea, Esq., of Counsel.

Transcript of Proceedings, May 20, 1970

The Court: Mr. Hayes or Mr. Davis.

Mr. Hayes: I am first on the batting order, your Honor.

May it please the Court, your Honor has before you a proposal by defendants and a counter-proposal by plaintiff.

We submitted our proposal to plaintiff yesterday morning, the latter part of the morning, and we received their counter-proposal in the early afternoon, giving us the motion that maybe their counter-proposal had been prepared before our proposal was received.

At any rate, the two proposals have a distance between them that can be measured only by light years; and we submit that the plaintiff's proposal is wholly unacceptable.

[3] At the beginning, however, I would like to make one correction in connection with the letter plaintiff's counsel addressed to your Honor having to do with the acquisition of Harold's Club in Reno.

That was not an acquisition by the defendant Tool Company.

As I said last Monday, or Monday of last week, in my brief remarks to your Honor, we have here a most extraordinary situation, calling for extraordinary solution. Unfortunately, since Monday of last week, I have been almost entirely out of circulation with the result that the burden of carrying on pursuant to the suggestions your Honor made at that time fell entirely on Mr. Davis' shoulders. There was a further complication in that Mr. Holliday was in Europe on a business trip from which he was not expected to return until the end of the month. But he was called back from Europe and Mr. Holliday and Mr. Davis pursued the bonding company and lenders approaches which were discussed at our prior meeting.

Suffice it to say at present that neither approach offers any hope. But Mr. Davis is prepared to answer any ques-

tions your Honor has and I think it would be better coming from him, your Honor, rather than [4] from me as I was not party to any one of the conversations.

As we see it, the goal here, the goal of the motion, I should say, which is before your Honor, is to establish security for the plaintiff so that when, as and if the judgment now on record is affirmed, the plaintiff will be able to collect it.

That is what we in effect are proposing. What we are proposing really is a sort of guarantee—not in the technical legal sense—but it is in effect a guarantee that the firm Toolco will have available for payment of the judgment three times the amount of the judgment, which already closely approximates the third alternative of Rule 31, which I mentioned to your Honor at our last meeting.

The stay, as we propose it, becomes ineffective if the net worth of the Hughes Tool Company goes below three times the amount of the judgment.

In addition, we propose to supply quarterly, or, if necessary, more frequent certificates by the treasurer of the Hughes Tool Company, which will in turn be supported by certificates of Haskins & Sells with whom arrangements have been made to perform a sort of continuous audit of the transactions of the defendant Hughes [5] Tool Company.

What we propose eliminates completely any need for policing of any kind, and in that connection we were rather surprised when we received plaintiff's counter-proposal.

The impression that we had all gotten from the prior discussion was that the plaintiff was not interested in liens and now it asks for mortgages. They were concerned about valuations and questions of that kind, but now they ask for mortgages, and it is because they were not inter-

ested in liens that an effort was made to find a route here which would secure to the plaintiff and would eliminate the need for liens.

We submit that our proposal is reasonable and fair and that it assures payment of the judgment if the judgment is affirmed.

Plaintiff, on the contrary, appears to be intransigeant, [*sic*] and so we are relying on the discretion of the Court.

Since it is not possible to comply with the first and second subdivisions of Rule 31, and since what we propose, as I have already mentioned, closely approximates the third subdivision of Rule 31, and since what we propose cannot cause any harm, damage or injury [6] to the plaintiff, we ask that the stay be entered here on the basis of the terms which we have suggested in our letter addressed to plaintiff yesterday, or plaintiff's counsel, a copy of which was transmitted to your Honor.

If there are any questions your Honor would like to address to what efforts have been made in the intervening time, I am certain that Mr. Davis will be perfectly willing and happy, your Honor, to answer them.

I thank you, your Honor.

The Court: Mr. Davis, what efforts have been made?

Mr. Davis: I beg your pardon?

The Court: Would you detail the efforts that have been made.

Mr. Davis: Yes, sir.

We got in touch with the head office of the Seaboard Surety—that is, the parent company—Mr. H. Marshall Frost.

And with Mr. Scharffenberger of City Investing Company.

I got in touch with Mr. Wells, whose letter is attached, of Fireman's Fund American Insurance Companies.

[7] I met with the Chase Manhattan Bank, Mr. James Mitchell.

We then arranged with the Bank of America to send a senior vice president, and two people that came from the Los Angeles office, Mr. Sugaski, senior vice president, and Mr. Cawley, assistant vice president, came with him.

I then called on Frank McClelland, the senior partner of Haskins & Sells, who was in charge of the Tool Company account from Houston, and he came to New York to participate with us.

I also called in the treasurer of the company, who was on Hughes air business in San Francisco, and he came to New York to participate in these meetings and discussions.

After our meetings with the banks, primarily the Bank of America, we made an effort to try to find a practical, realistic way of assuring the plaintiff that there would be assets available without approaching it from the point of view of the problems or difficulties of the lien group because having understood or misunderstood what Mr. Tenney said but having checked it out on the minutes of the last meeting—at that time I don't think I fully appreciated perhaps what Mr. Tenney [8] was speaking to, but the Court obviously understood because I see on page 22 the Court saying:

> "Well, Mr. Tenney says when you get into the area of putting a lien on property, you made him a policeman and that shouldn't be his function. I think that's your position, isn't it, Mr. Tenney?"

And Mr. Tenney answered: "I think so, a policeman after the thing is entered into."

And your Honor said: "I didn't think he should be a policeman."

And I said, "I don't follow the policeman concept." Whereupon your Honor said:

> "You say we are going to give you properties, he has to go out, investigate the properties, see if there are any liens on it, he gets involved in checking on your security, and that isn't the plaintiff's problem or the winning party's problem under the supersedeas bond theory. It's your problem."

And upon further reflection I realized that there was a lot of merit in what Mr. Tenney was saying because the problem we ran into—and I have had some discussion with Mr. Tenney about this lien approach [9] and if there was a way of placing liens on properties, either all real estate or a portion thereof, in some manner that would not involve a monumental task of achievement.

What I told Mr. Tenney was that I was prepared to discuss it if that was a way to find a solution.

The more I thought about it, I found there were more problems in solving it.

When you attempt to put a lien on the realty which of course does not move you get into the problems of what happens to fixtures which are affixed to the realty—are they personalty or realty—what is movable and what is not movable.

And when you talk about hotel properties, obviously you don't want to talk about bare bricks and mortar. You want to talk about what goes into the hotel itself, and the accounting system is not geared to separating things which are removable and are not removable, and I was getting myself into all kinds of these problems.

So I came to the conclusion that in the last analysis, the ability of the defendant to pay—there is no question

that if contrary to our expectations we are going to have to pay, we have the net worth, we have the assets with which to pay—there is no question about [10] that.

The question is, if I understood Mr. Tenney's fears as previously expressed, he would be satisfied but for the fact that we happen to be in a situation where the single shareholder might be in a position of causing assets of the corporation to be distributed to him and therefore not be readily reachable by the plaintiff—notwithstanding the decisions in this court to the common identity between corporate identity and the individual, for accounting purposes; when we talk about the net worth we are talking about the net worth of the corporate entity, which Haskins & Sells are certifying to—the property in the Tool Company, not in Mr. Hughes.

Some confusion always arises when you acquire a gambling casino in Las Vegas. Its assets are not frozen in any way, but if it is income producing, it creates some confusion.

But when we come to the day of payment, when all is said and done, assuming that by that time we have not liquidated some of these frozen assets, of real estate assets, into cash—I know that at one time people said Mr. Hughes would never permit the Tool Company to sell the TWA stock, but the market was at a level which he thought justified a sale, and it was sold without any [11] pressure from anybody, actually.

So we have got to retain flexibility to be realistic. We have a lot of real estate values. We have a piece of real estate in Culver City, California, that adjoins property that Xerox recently bought at $200,000 an acre. That real estate alone, properly carved, can be sold and will produce the cash necessary to pay the judgment.

So we have a problem when you try to talk of liens.

In Nevada we have been asked to do things; we have to give a right of way; sometimes we have to do things with the city with respect to airports. Every time that occurs, if we had a lien on the thing, we would have to go to the lienor and say:

This is what we want to do.

So I began to understand after our last meeting what Mr. Tenney obviously had in mind when he said the proposal of a lien does not seem to solve his problem.

So I approached the problem with Mr. McClelland of Haskins & Sells in terms of what it is that we could do that could effectively I think as a practical matter assure the plaintiff that the assets of the Hughes Tool Company now available would remain available at least in [12] net value during the period of the stay.

We spent a good bit of time discussing how long it took to do audits, and the solution we came up with, and Mr. Holliday agreed to, and we arranged as to the additional expense, Mr. McClelland said they could get the accounting personnel that they needed, and if everybody thought it was reasonable, make a quarterly report to cover the audit report, the three months' period intervening in case anybody is worried about what happened in that interim period; that in that intervening period of time Haskins & Sells was prepared to give what they call a comfort letter, the kind of letter given to underwriters that nothing has occurred from the last audited date to the date of closing.

Here we would have a situation where we would have quarterly audits between the dates that the audited certificate would become available in the months intervening.

Attached to the treasurer's certificate would be a Haskins & Sells letter that would confirm that during their con-

tinuous auditing procedures nothing had come to their attention to indicate that the validity of the treasurer's certificate was questionable.

That in substance describes what we have done.

[13] I have not had an opportunity to other than discuss very briefly and among ourselves the problems which arise and the cost of the expense that would arise in connection with the giving of a lien.

If your Honor would want me to, I can describe the reasons why attempting to obtain a banking commitment at this time—

The Court: You said that you spoke to the Bank of America and Chase, and I would be interested to know their reactions to your advances.

Mr. Davis: The most favorable one was from the Bank of America, and they started off by saying that they are perfectly prepared and willing to do whatever is necessary and whatever we need.

Having said that, and now skipping all the desires of the bank to keep a valuable customer and now taking away all the beautiful words, and they are familiar with our financial situation because they do have access to our financial statements, the hard cold facts boiled down to this.

No. 1: There is a ruling that the control currency applicable to national banks cannot guarantee the debts or obligations of others.

Their internal counsel believes that a commitment [14] for this purpose could very well run afoul of that ruling.

However, they said they also have consulted sophisticated New York counsel—they did not identify who—who in effect said that, well, that problem could be resolved if we were prepared to go forward and not merely with a com-

mitment, but with an actual borrowing, I think maybe an actual borrowing.

Then they say that you could deposit the money that you have commercially borrowed and deposited it in CD's, and get some of the interest cost back through the CD's.

They then say that while you must understand there is a fairly close relationship now where the interest rate may be only a point to a point and a half above what the CD rate may be, there is no logical relationship between the interest rate that may be continuously applicable and the CD rate which we may be permitted to pay under the banking regulations.

Therefore you must be prepared to a spread of two points or possibly even more, which when translated into terms we are talking about, is another three and a half million dollars a year.

[15] After pointing that out, they say:

You must also understand that we have lending limits, and if we can't do it alone—we would be very happy to do it for you but, of course, you understand we can't do it alone, you would have to go and find yourself, four, maybe five other banks, to participate with us; and while we would be willing to make it, we cannot say what terms and conditions the other banks might insist upon before they could participate.

They then say there is another thing which we ought to call to your attention.

From the point of view of our lending limits, we have to regard the Tool Company, Mr. Hughes, but also Hughes Air as one.

Mr. Holliday also said that while they may legally not be compelled to act, Hughes Aircraft Corporation, as a practical matter, they do.

They also say a normal letter of credit does not affect lending limits because that is good for buying and selling. But for this purpose, if an actual loan was made, the lending limits are applicable, so they say you must bear in mind that to the extent to which we actually make a loan, we will be adversely affected in the extent to which we can give financial assistance [16] to Air West, and Air West, by the way, also happens to have Bank of America as their traditional bank for periods in the past prior to our coming into the picture.

They also point out that HAC, who does $750 billion a year business for the government on these other things, while having nothing to do with the Hughes Tool Company, does have banking.

So you reduce all that and you say: What does that mean in terms of how much you can do?

And they say: Well, we don't know exactly yet but we would be happy to do it.

What will it cost?

Well, we cannot exactly tell you what terms and conditions.

But you put all those together and the only conclusion you come to is that it is not realistic, it is not practical, or, from our point of view, the burden and expense we would be incurring and which TWA would incur, if we are successful in appeal, is hardly justified in the light of what we consider to be an ironclad assurance to the extent to which anything can be ironclad in this world, that our net worth, the capability to pay, will always remain, your Honor, substantially in excess.

[17] If you start talking to accountants and you ask them to certify a dollar figure for you, they want more time then and they won't do anything until they finish an audit.

But however you express the thought, what I thought was to me a reasonable solution of the problem was what I regard as much of an assurance as anybody can obtain, that between now and final judgment day no asset of the Tool Company can be passed on in any form to anyone else without affecting its net worth. And so long as our net worth is substantially in excess of three times the judgment, I thought it might have been something that Mr. Tenney or his client felt was a reasonable approach to it and one which would solve the problem of how do you deal with the horrendous mechanics involved, as well as the time and effort and expense involved in trying to place mortgages and liens in all these kinds of properties in the amounts that are here involved.

If it was just a question of taking a particular piece of property which by itself was sufficient, it would be relatively simple to do.

I suppose the problem I am talking about is all related to the magnitude of the amount that we are [18] talking about.

The Court: If you went to a surety bonding company and assuming they would take it, what would the premium be?

Mr. Davis: We never got into active discussions of the premium because they never got off the tack that they would have to have cash or cash equivalent collateral.

Our position on that—I went back and said: You can assume a reasonable time to liquidate. They said the trouble with us is that we are not geared, we don't have a real estate department.

We are not like a bank. Our business is strictly that of investing our moneys in all kinds of securities, which is our portfolio, and we do not have real estate people and

therefore from our point of view this would be a bond of such a large amount that the premium would be something that could be negotiated.

They also say: Of course, we would take the lead position, but we have to go and get others to join us, and of course we don't know what position they would take.

By the way, I must also say that the Chase made a point that today's tight credit situation is such that [19] most banks, including the Bank of America, except for very good customers, find it very difficult to adequately service the normal needs of the businesses that go to them because money is tight.

That is the reason for the high interest rate. So they say normally you go to a bank to arrange a bank loan for the purpose of making an acquisition, expanding, adding new lines to your business, income-producing things. The idea of a bank actually lending the money to someone for the purpose of in effect liquidating a portion of its business is not a normal thing for them.

Now at the same time they will say to you—the Chase said:

We would love your business, we would love to talk compensating balances, too.

They all say they love the business. But when you get through their desire for an opportunity to do business, you run into the problems there that I have outlined.

The Court: Mr. Tenney.

Mr. Tenney: Your Honor, there is one point that is not before you properly today that Mr. Davis has been commenting or but I must reply to because he obviously intends this for future reference.

[20] That is the question of how costs on appeal or costs of appeal will be taxable once the appeal has been decided.

As I understand it, and, of course, this is not before your Honor today and will be before your Honor or someone else at some future time, as I understand it, the only costs involved in this securing a supersedeas here, the only taxable costs, would be the standard premium of a surety company for writing that kind of bond.

Such costs as defendants engage in, in putting themselves in a financial position to get that sort of thing, borrowing costs, and so on—

The Court: What would be the standard premium in a bond of this size?

Mr. Tenney: I would—I believe it would be 3/8ths of one per cent per annum, approximately $375,000 a year or $400,000.

Mr. Davis: I can get you, if you want, the citation of a case that holds if you have to borrow money to get a bond, the cost of borrowing is also taxable.

Mr. Tenney: That matter is not before your Honor and I cannot allow that to go unchallenged on the record, your Honor.

[21] To turn to what is before your Honor, after ten days of inquiries pursuant to your Honor's direction, the defendants have come back offering nothing. They have even retreated from one of the alternative branches of their original motion. They alternately moved in the original motion that there should be a stay with no security or with approximately one third of that security in the form of some liens.

Now that one third liens is out. There is no security and that is all they are talking about.

There is no guarantee suggested. Mr. Davis speaks about a guarantee.

A guarantee by whom?

Haskins & Sells? This is no guarantee. Haskins & Sells will not pay the judgment. It is not a guarantee in any sense.

There is no undertaking talked about as to future conduct, no information whatsoever as to present financial position except some kind of thing that they speak of a certificate from auditors or the treasurer on net worth.

What do they mean by that? They say something, such as the treasurers' certificate, in the moving papers, that the net worth is at least in excess of a figure.

[22] Now if an auditor certifies as to that, what does that mean?

I don't know what that means. I don't think anybody really knows what it means. They don't suggest it would be accompanied by an audit report or any list of assets. It is also a report after the event. From time to time the auditor would report what has happened. What happens between reports, this is our risk.

Now, your Honor, the leading Supreme Court case, according to the defendants' brief that they filed with you on our prior hearing, is Rubber Company vs. Goodyear.

That is, certainly, one of the leading cases, your Honor.

Now in that case the Supreme Court said as to a supersedeas bond, as to the amount, that "what is necessary is that it be sufficient, and when it is desired to make the appeal a supersedeas, that it be given within ten days from the rendering of the decree."

Your decree was rendered over a month ago.

Your Honor, the right to appeal is by statute and by precedent entirely separate from the right to a stay of execution pending appeal.

Under the Supreme Court law which as a rule of [23] positive law, it is clear that the defendant in a judgment

for a sum of money is entitled to a supersedeas only upon providing a sufficient security.

Now that much I think is unchallenged to be a rule of positive law.

We tend to feel that that sufficient security should be a bond in the amount of 111 per cent, but I won't bother your Honor going over that again.

If we assume that your Honor is to determine what the amount and form of the security should be, your Honor certainly in the light of the law is guided by the principle that it must be sufficient, and on that basis your Honor, we in the last ten days have attempted to see what could perhaps be sufficient short of the bond that we thought we were entitled to.

I must say that I am very surprised to hear from Mr. Davis that TWA does not want liens because it is too much trouble; we want a bond because we think it is too much trouble, but if we can't get a bond, what do we need?

What do we need?

We put what we think we need, perhaps too complicatedly, in this form of order we suggested to your Honor.

We tried to keep it simple. We tried to keep it [24] as untechnically really, as we possibly could.

We start out with one very immediate and urgent need that I think we need today. We need an order from this Court binding upon the defendants that are before this Court, Hughes Tool Company and Mr. Holliday, Hughes Tool Company for present purposes, that will preserve their assets from distributions that will prevent them giving them away or putting liens upon them other than for fair value—that is paragraph 1 of Section 3 of our proposed order—and that will prevent them from distributing their assets to their sole stockholder with some kind of a

limitation. The gentlemen are certainly entitled to maintenance.

But we need that without waiting for anything else because we hear—and, as a matter of fact, as my letter actually stated it and as it was cited in the Times, and as Mr. Davis has now confirmed, Harold's Club in Reno was purchased by Mr. Hughes, not Hughes Tool Company, and, of course, we know we don't have jurisdiction over Mr. Hughes here.

The New York Times mentioned a number of Las Vegas corporations in that same story, quite a number.

We have understood and we thought we had information on this, but obviously, your Honor, we could [25] be wrong, but we had understood that those Las Vegas hotels and other properties were owned by the Hughes Tool Company.

It may be that they are not owned any longer by Hughes Tool Company. There is no information available to us or to your Honor on this.

So we need something that is effective immediately that will prevent the assets—whatever the assets of Hughes Tool Company are—from being dissipated while these other things are in effect.

What is the next thing we need if we are not to have a bond?

We need some information. We need something beyond a letter, some figure of net worth from an accounting firm.

Why not an audit report? Why not a list of assets that one can look at and see what the possibilities are.

It is very difficult to ask the plaintiff to come up with specific ideas as to what kind of security can be given when we have no access to the information.

Bank of America has access to the information, we are told.

[26] Mr. Davis has access to the information. Mr. Davis has conferred with the Bank of America and concluded that he does not want his client to give any liens.

Bank of America, however, would like the business.

I don't know what we are supposed to say to this. We are not in a position to say exactly what they can do here. We haven't the power or the information to make an effective suggestion, really.

So what we have tried to do in the first section of our proposed order is to come up with something that is a little bit of a shotgun approach that would give perhaps a sort of smorgasbord to the defendants as to what kind of security they wish to put up.

They have said that a $161 million bond from a surety company is too hard, too expensive. They could get it; they just don't want to liquidate or borrow money.

The Court: That is right.

Mr. Tenney: Suppose they can't get that $161 million? How much can they get?

What they can get goes towards $161 million. As far as we are concerned, it is helpful. If you can condition the bond on payment of the judgment in full and [27] make the amount of the bond say $50 million, we have got protection for the top 50.

You can add that 50 up together with such current assets as they have got, cash or the bonds, all right, perhaps that is hard to find. Perhaps they don't carry their money in that way.

Marketable securities. We tried to think how one could get in a non-controversial way and of course the New York Stock Exchange, subject to very careful supervision of the SEC, has some very elaborate rules governing member firms' capital for the protection of the public. And of

course many of these firms carry much of their capital in the form of securities.

So they do have rules as to what kind of securities are basically acceptable and what kind of discounts you put on them to take care of the obvious fact, particularly today, that yesterday's price might not be tomorrow's value.

Then first mortgages—they have real property now. I don't know how many of these gambling properties are Hughes' property and how many are Hughes Tool Company's property.

We have not been offered any information on that. But whatever they are, they are.

If they don't like to have a large number of [28] pieces of paper, select the most valuable ones.

The amount of assets involved in operating a company having a net worth of $500 million—I am not sure; we don't know—the assets are likely to be tremendous in total value. You don't have to write a mortgage on everything.

Pick the things that are acceptable and add it to whatever list you can make.

That would be something that of course is not as desirable from our standpoint as a surety bond. We would rather have a surety bond, but if we can't get that we would, at least, be secured.

On the other hand, some of these things may seem to defendants in other than a debating context to be a little harsh, they think.

I don't think so at all.

We have tried, in the last section of our proposed order, to point out, and we have tried to be realistic on this also, and, I think, generous, that none of the rest of this need make any difference if we get the surety bond in standard form.

Barring that, the entire lien picture could be obviated if we had what I believe most lenders certainly would expect from a company owned by a single stockholder [29] even if that single stockholder were a corporation, if we had a kind of a guarantee by that stockholder, so that we know—

The Court: I don't know if I would have jurisdiction.

Mr. Tenney: If he has pledged to secure his guarantee, his stock interest in Hughes Tool Company with this Court, you have jurisdiction over that property, and your Honor, that is something that would be very close to the provisions of subdivision 3 of Rule 31.

What defendants are suggesting is not at all close.

The Court: Are you suggesting that Mr. Hughes put up as security for the payment of the judgment his stock of Hughes Tool Company?

Mr. Tenney: In effect. I think it would be best for him to go through a guarantee that his fully owned company pay the judgment and secure that guarantee by a pledge in this court of his stock in the Hughes Tool Company.

Then we know the total worth of Hughes Tool Company is behind this judgment. As long as he holds that stock, we have no protection at all.

As I say, I think we are entitled to sufficient [30] security.

The Court: Mr. Davis, how about these auditing costs?

Mr. Tenney makes the point that if you went to borrow the money you would have to produce for the lender detailed financial statements.

Now why shouldn't the plaintiff have detailed financial information in this case if you want them to ride along on some sort of a promise?

Mr. Davis: Your Honor, I have no objection to giving that to TWA on the assumption that the approach is a

satisfactory one. I don't see any necessity to produce financial statements for them if the approach is discarded.

I approached it on the basis of the situation of Haskins & Sells. If they want to see the balance sheet to which Haskins & Sells are certifying at that time, that to me is not the problem. The problem I have been addressing myself to is establishing a net worth.

The Court: They want to see what Haskins & Sells calls net worth.

Mr. Davis: Well, it is the stockholders' equity.

[31] The Court: I know the book definition, but that doesn't help the party. He wants to see how it is set up because there are an awful lot of ways of setting up a balance sheet.

Mr. Davis: There is no question that if they want to see the balance sheet to which Haskins & Sells is certifying, I will give them the balance sheet to which they are certifying. It is not to increase or decrease the assets. That is not the problem, as I see it. If we agree that so long as we maintain a net worth determined in accordance with generally accepted accounting principles—accountants, I believe, call it stockholders' equity—it is my word, net worth; it is the same thing, namely, assets, the original cost of depreciable assets, the depreciable cost exceeding all liabilities—that is, the stockholders equity.

I have no problem in furnishing them the things that Haskins & Sells are certifying.

Originally they said who is going to tell us that, in fact, analyzing and understanding whatever it is all about, the original cost of all the properties in the Tool Company exceeds all the liabilities by this amount.

And I was coming to this last line, which is the treasurer's certificate, the Haskins & Sells' [32] certificates.

If they want to see the balance sheet which Haskins & Sells certifies, which establishes it, I have no problem with that.

I would ask that it be treated confidentially, your Honor.

The Court: Obviously it would.

Mr. Davis: Yes, but that to me is not the real problem. Getting a lien on this property does not increase the value of the property which you are going to have to collect on judgment day.

The thing that you only accomplish with the lien, depending on how much time and effort we spend on putting provisions as to what can be done when something has to be done in running the business, the cost and expense which is incurred—I submit the test I have applied is what good does it do TWA in so far as being able to collect as against what harm does it do to the defendant, which has to pay the judgment, to be sure—but also what harm does it do to TWA in the event of a reversal.

I don't understand Mr. Tenney when he says the issue is not before you. We are in an issue which is principally discretionary with your Honor—

The Court: Very frankly, Mr. Davis, what is to [33] happen to TWA in the event of reversal is not my problem. That is Mr. Tenney's problem. And if it doesn't bother him it is not going to bother me. It is his corporation that pays it. I don't.

It doesn't seem to bother him, so it is not going to bother me.

Mr. Davis: The idea of our having to pay three or four million dollars a year in interest charges or more in excess of whatever we can do with this does bother us.

The idea of having to go to TWA every time we want to change sinks or fixtures, or worrying about the prob-

lem of trying to get opinions as to whether or not this particular fixture is so affixed to the realty as to be subject to a lien and may not be removed without getting a release from the lienor, is to me a burdensome way of attempting to operate when the objective is to leave the defendant in the best possible position to be able to pay when payment is required.

When we come to the problem of having to sell or dispose of a particular piece of anything, and each little piece will be subject to the entire lien, based upon past experience, we would be running to the Court for the resolution of problems that have arisen, not [34] because Mr. Tenney himself might be unreasonable, but then he will say this requires an exercise of business judgment, and we don't want to exercise business judgment.

At least that is the way I interpreted their entire position and it convinced me in a way that it had merit to it.

We come back then to the question of what is value of property.

They say that they don't want to go through a valuation proceeding, and I agree.

The way you take the value of any corporate entity is through its balance sheet, which establishes a net worth or stockholders' equity, call it whatever you want.

There are accounting principles. We normally take the certified public accountant's certificate and look at the bottom line to determine net worth. If someone wants to disagree with Haskins & Sells or ask questions of Haskins & Sells because of the various categories of properties above, then that is all right with me.

The issue is if we are going to proceed and concentrate on the merits of this lawsuit or are we going [35]

to wait until there is a final judgment before we concern ourselves with payment.

The only thing I thought we were trying to accomplish was to make sure that whatever properties there are inside this corporate shell, they would never go below a certain level.

The Court: What about Mr. Tenney's word about distributions to the sole stockholder?

Mr. Davis: That would reduce net worth.

The Court: He doesn't want those, in any event.

Mr. Davis: One of the problems we have there is, as he points out, the individual stockholder now has to pay all the taxes, but if we want to go into a limitation of distributions we can go into that, but it is an area I have not explored to this point, and to me it is the same thing as saying net worth shall not go below a particular level. We can pick as high a level as we want to and if we go below it, we can come and ask permission of you.

The kind of thing we are not to do is not only the distributions to Mr. Hughes but the kind of thing that can happen as when we went into the manufacture of helicopters, where on the initial development of the [36] helicopters you incur losses, and that kind of thing is more likely to affect the net worth.

But we don't visualize anything like that occurring within the next two years, and therefore we are prepared to consent to a stay which would be effective only so long as the net worth remained above a certain level.

The suggestion of having Mr. Hughes guarantee the obligation of the company as far as the stock of the Tool Company is concerned, it is not worth any more than the assets.

So it seems to me that it is not really accomplishing anything.

The only thing to my mind which really accomplishes anything is the certification of independent people who are normally accepted in the financial community as certifying to the public of the value of any company and having them certify periodically—I grant it that waiting a year is too long, so we come down to say:

Okay, we will arrange for in effect a continuous audit, but as far as Haskins & Sells is concerned, the whole public trades upon the value of corporations based upon this certificate of net worth.

When we talk about the value of net worth of [37] balances, that is what we are dealing with.

I have no objection to that if that solves his problem. I haven't given it to him yet because we have not agreed on what it is we were going to do.

To try to go through appraisal proceedings and all these other things which of course would be involved with an actual financing, it is the very kind of burden and expense which we submit in the exercise of your discretion should not be imposed upon us.

The Court: Suppose you get a copy of the statement, Haskins & Sells' certificate. Would that give you a better understanding?

Mr. Tenney: Unquestionably, sir.

One difficulty about that on a sight-unseen basis is that a balance sheet can be very uninformative because of just general things.

The Court: I understand that.

Mr. Tenney: I should think that for me to be sure reasonably, just sitting here, that it would meet our

needs for information, it should be accompanied by a list of major assets with the figures at which those assets are reflected on the balance sheet, and I have that suggestion in section 2—

The Court: Do you want all assets or assets [38] over a certain amount?

Mr. Tenney: In my order I suggested assets of over two million dollars, or something like that. It is just an attempt to catch the big ones and see what we are talking about. There is nothing magic about the two million dollar figure. I was trying to pick a figure which would possibly catch a jet for one thing. The jets are pretty expensive.

But there is nothing magic about that. It is just a major asset thing.

Now that would give us information on the basis of which we could—

The Court: That makes some sense to me, Mr. Davis, because you just cannot ask the plaintiff to take a report of Haskins & Sells without seeing what they are reporting about, what their certificate refers to, and what the certificate contains.

We have had so many of these cases around here in the last couple of years with the SEC, 10(b)(5), et cetera, where the accounting firms' faces are quite red, and there have been some indictments of senior partners of accounting firms in this court, and I am not quite sure what the certificates mean any more.

Now this is no reflection on Haskins & Sells. [39] I don't even know if one or any of their partners were involved.

Mr. Davis: Your Honor, they audit TWA.

The Court: But I think before the plaintiff is asked to buy this he ought to be able to see that balance sheet for

analysis and then come up with anything he thinks in addition. If that is satisfied, then I am perfectly willing to buy your proposal, but I won't buy it unless Mr. Tenney is satisfied not just of the certificate but of the thing that is being certified as something of meaning to him.

Mr. Davis: There is no problem with that, your Honor.

The advice I have is that they will have the December 31, 1969, audit prepared by the end of this month. I don't have a balance sheet as of the end of that year audited by Haskins & Sells until that time.

There is no problem to giving that to Mr. Tenney and if at any time he is dissatisfied with the certificate of Haskins & Sells based upon that balance sheet, notwithstanding they are the auditors of TWA, then I think he should be free to come to your Honor and say:

I don't want to continue it any longer for any [40] reason.

The only thing I am not clear about is whether this work —which cannot be done any day; I don't know how it can be done—is the purpose now to give them a balance sheet so they can decide if they will buy the approach or are they saying—

The Court: No, they are saying that they are not buying a pig in a poke, and I agree with them.

Mr. Davis: I will undertake that if we can have an agreement that the balance sheet furnished to them will remain confidential.

The Court: That is obvious.

Mr. Davis: As soon as one is available, I will make it available to them with the certificate of Haskins & Sells, and I am sure the Haskins & Sells partner who runs the TWA audits communicates with the fellow who audits us in the Hughes Tool Company, and they can have their

Haskins & Sells people discuss with our Haskins & Sells people, and on the basis of confidentiality, find out anything they want to find out.

Mr. Tenney: Your Honor, on the Haskins & Sells thing, I think it is very important that I point out that Haskins & Sells were selected as TWA's auditors at the time when Hughes Tool Company had control of TWA, and [41] I am not trying to criticize Haskins & Sells.

The Court: But you continued their employment.

Mr. Tenney: We have kept them very carefully out of matters dealing with this litigation, and in fact we retained Price, Waterhouse as our experts in the damage hearing, and it is very tricky, indeed, and I don't think a law firm, for example, would be ethically well advised to accept the kind of proposal that Mr. Davis has just made.

The Court: Wait. What you have to find out is what you need, and I don't know why Haskins & Sells can't answer that as an accounting principle question.

Mr. Tenney: Yes, sir, they can. I just don't want it internally between whoever there works for TWA and whoever there works for Hughes Tool Company, which is Mr. Davis' last suggestion.

The Court: Oh, no.

Mr. Tenney: One other thing, your Honor. I do wish to emphasize that any report by an accounting firm speaks as of what has happened in the past.

The interval between reports, even if it is covered by what Mr. Davis and Mr. Hayes has called a comfort letter —it is also commonly called a cold-comfort [42] letter— maybe very cold comfort indeed as long as it is simply reporting on what has happened.

And I do think if we are to continue this stay any further, we need an affirmative order directed to Hughes Tool Com-

pany, which I think could cover essentially the two points —and I think the two points perhaps are verbatim—that we have in our section 3 of the proposed order.

One point is an order against the disposition or encumbering of any of the principal assets except for fair value.

I was trying to tie that to whatever assets were in the list of principal assets we would have of the thing, but principal assets. As long as it is fair value, this would give them the flexibility that they are talking about.

No. 2, a restriction upon the totality of distributions to their single stockholder.

Now that restriction can be a reasonable restriction. My suggestion specifically was that the total, the sum of whatever he needed to pay the taxes on the Tool Company income under sub-chapter S, he pays the Tool Company taxes so they could distribute him the money to pay those taxes, plus, we suggested, five million [43] dollars a year.

If that is not a good figure, any suggestion would be welcome.

The Court: What about that, Mr. Davis?

Mr. Davis: I am not in a position of commenting on that. This is something that didn't hit me until I received this.

The thing that bothered me most about what Mr. Tenney says is that he wants to impose restrictions on fair value.

Who is going to determine fair value?

The Court: What he carries on the books, I assume.

Mr. Davis: No. He says he wants a restriction on any liens on the property. If we borrowed money, it will go on the liability side and reduce net worth.

Mr. Tenney: No.

The Court: You come out even.

Mr. Davis: It depends on whether he says it is going to be a fair value. He says if you borrowed, you maintain

the original cost because the value of the property has gone up, and what I am saying, your Honor, is that would then all be down, there is no question about it. In fact, it is way down in some rational basis when [44] you borrow money from banks or insurance companies. But there you can go to the office of the trustee who is in a position of releasing provisions if they don't work when a business situation comes up. But we can go and follow the form, if you please, of what you would do in the event of getting a mortgage, which has all those provisions worked out. They have to be applied to specific properties. They take a long time to prepare and we will be here before you as to the reasonableness of even one of these clauses.

I have no objection to going into the work, but when we are all through, I don't think we have increased the security of TWA in any sense because to my mind the security of TWA is always going to be not whether we like and have confidence in accountants' certificates. In the last analysis if the judgment is to be paid it is going to be paid by our being free to so handle our affairs between now and judgment day so that we will be in a position of paying the cash they want.

They don't want to liquidate the properties on which they are going to freeze us in.

The Court: They also want to make sure that the money is going to be there.

Mr. Davis: And the best way to do that is let [45] us run our business knowing that we have to pay it and knowing that if we are not ready to pay it when it becomes due, we are in real trouble, and by not interfering with our business.

The Court: Who is in real trouble?

Mr. Davis: We are.

The Court: Who is "we"?

Mr. Davis: The two companies.

The Court: Maybe there is a shareholder.

Mr. Davis: We want to be able to sell at a time when it should be sold. We want to be able to make deals with our property.

We are talking about very large sums of money here. If it was a question of freezing a particular house or plant, forget about it. But if you are talking about an across-the-board plant, which we have been discussing here, my problem with that on a broad restriction that we may not do certain things—it does not increase the ability of the Tool Company to pay the judgment. If anything, it decreases it.

In so far as the property disappearing is concerned, the property cannot disappear to the extent to which it is real estate, in any event. And I don't see how you can get any more protection than the continuous [46] monthly certification that our net worth is in excess of a certain amount.

They don't want to exercise business judgment in running our business. It is going to be the business judgment of the Tool Company how it raises this money if this judgment becomes payable.

I could freeze everything we have and stand still, and this is final judgment day, and then we have a problem of liquidating. Then do they want to liquidate? It is obviously going to be the responsibility of the Tool Company, and the only protection in my judgment they will ever have is that the assets of the Tool Company will not drop below a particular level.

Assets determined how?

Assets determined by accounting principles by an accounting firm that they certainly have confidence in,

and free to come to your Honor at any time anything occurs and say:

We want the stay lifted because we are insecure, because the proposal we made was not a proposal where we would have an inevitable stay for whatever period, only so long as we satisfy them.

If at any time we submit a certificate to them during the course of this period which they are not [47] satisfied with, they are free to come to your Honor and say:

We want the stay lifted because this is not adequate.

In other words, my proposal, the proposal I outlined in my letter, was not in the form of a firm stay between now and final judgment day, but only so long as we maintain certain conditions and furnish certain certificates without their being bound at any time; that if anything occurs by reason of the certificate they receive or a balance sheet that they receive causes them to feel that the values of real estate somewhere, something may be happening, they are free to come to your Honor and say:

We feel insecure.

I am not asking for a permanent stay at this time but only for a stay so long as we certify and submit satisfactory evidence that we have a net worth three times in excess of the amount of the judgment.

The Court: When will this report from Haskins & Sells be available?

Mr. Davis: They told me they would be available at the end of the month. They are later than usual for a number of reasons:

[48] One is that they have been working on this stuff, Air West, and because we are not publicly held—we are always at the tail end.

But this Frank McClelland said that he would put together a staff of Haskins & Sells people and put them in there thereafter if this proposal was acceptable to the Court, and give us a quarterly auditing by people in the company's offices so as to in effect have a continuous audit going on all the time.

And whatever you may say about a comfort letter, which underwriters may call cold comfort, once you have those people in your plant, there is very little going on that they don't know something about.

The Court: There are a couple of partners in accounting firms in jail now who had people in plants certifying to generally accepted accounting practice.

I am going to do this. I am going to put this over once more. This will be the last time.

I want the report of Haskins & Sells certified for the year in the hands of Mr. Tenney on Monday, June 1st, and we will have a conference on this on June 3rd.

Will that give you enough time to review it, Mr. Tenney?

Mr. Tenney: I will try hard, your Honor. It [49] obviously depends to some extent on how much I have to get into the details.

I can certainly give you a preliminary report. I will be much better off than I am today, sir.

The Court: We will tentatively set a hearing on June 3rd, at 10.30. We will notify you where it will be.

But we will have to come to a resolution of this problem at the time of this conference. I can't let this go any further. It is a tough problem because the plaintiff is entitled to protection and he has got his judgment and the court says that he is entitled to it.

The rules say so. The law says so.

On the other hand, I understand the financial situation we are in today in this country, and to literally require compliance may hurt everybody here involved.

I am attempting to work out something which is fair to both interests.

So June 3rd is the last crack at this one.

Mr. Tenney: May I ask if the direction that we are to receive a copy of the audit report includes a list of principal assets, major assets, your Honor, covered?

[50] The Court: I think there should be. I don't know about the amount, though. This is what bothers me.

Mr. Tenney: I don't know about the amount either but the major assets in the sheets would be very useful.

The Court: Would $10 million sound better to you, or five or two?

Mr. Davis: I don't know. What I would like to suggest is with the time schedule, let Haskins & Sells prepare what they are in the process of preparing, and if there is some breakdown you want, I will arrange a meeting with them.

The Court: If you get a heading, "Real Estate," who knows what it means?

Mr. Davis: I don't think that it is broken down that way.

I will undertake to tell Haskins & Sells that in preparing that, they break it down as well as they can without having to stop the work and go back over what they have done.

After we get it, depending on the form we get it—the problem is to relate any list of scheduled headings in the balance sheet.

[51] The Court: If you take a large enough figure, that shouldn't be too difficult.

Mr. Davis: If you can relate the assets in the schedule to items on the balance sheet then you don't get confused.

The Court: If you use a figure of $10 million, I don't see how you are going to be too hurt.

Mr. Tenney: I would be satisfied with that for the present purposes.

The Court: List assets carried at $10 million tied in and list it in the balance sheet.

All right.

(Adjourned to June 3, 1970, at 10.30 a.m.)

Letter from J. V. Hayes to Judge Metzner
Dated May 22, 1970

May 22, 1970

By Hand

Honorable Charles M. Metzner
United States District Judge
U. S. Court House
Foley Square
New York, New York 10007

Re: TWA v. Hughes, et al.

Dear Judge Metzner:

This letter is being sent you now, with copy to plaintiff's counsel, so that you will not be surprised by an announcement in the press either late today or tomorrow.

This afternoon it is expected that Hughes Tool Company will acquire the Dunes Hotel in Las Vegas for a cash consideration of $35,000,000. This acquisition, which has received the approval of the Attorney General, is the result of three years of negotiations. Such an acquisition will not affect the net worth of the Company as the Dunes will replace the cash as an asset on the Company's balance sheet.

Another contemplated transaction, which must first be approved by the CAB, has to do with Los Angeles Airways, a local service operating within a radius of 50 to 60 miles of Los Angeles which is of great importance as a feeder line to Air West and to all other airlines operating into and out of Los Angeles. It is presently planned, assuming CAB approval, that the Company will lend Los Angeles Airways $4,000,000. and that, some six to eight months in the future, it will acquire Los Angeles Airways

Letter From J. V. Hayes to Judge Metzner
Dated May 22, 1970

for a total price of about $11,000,000., of which the cash involved will be about seven or eight million and the balance in long term obligations.

Mr. Davis who is more familiar than I am with the background and reasons for these transactions is presently out of the city, but he will be available beginning next Wednesday to meet with you and plaintiff's counsel to answer questions and to supply any needed information.

Very truly yours,

/s/ James V. Hayes
James V. Hayes

cc—Dudley B. Tenney, Esq.
Cahill, Gordon, Sonnett, Reindel & Ohl, Esqs.
80 Pine Street
New York, New York 10005

Chester C. Davis, Esq.
Davis & Cox, Esqs.
120 Broadway
New York, New York 10005

Order and Opinion of Judge Metzner
June 10, 1970

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

[SAME TITLE]

ATTORNEYS:

CAHILL, GORDON, SONNETT, REINDEL & OHL, of New York, N. Y., *for plaintiff;* DUDLEY B. TENNEY, PAUL W. WILLIAMS, IMMANUEL KOHN, MARSHALL H. COX, JR., and MICHAEL P. TIERNEY, of New York, N. Y., of counsel.

DONOVAN, LEISURE, NEWTON & IRVINE and CHESTER C. DAVIS, of New York, N. Y., *for defendants Hughes Tool Co. and Raymond M. Holliday;* RALSTONE R. IRVINE, JAMES V. HAYES, CHESTER C. DAVIS, GEORGE S. LEISURE, JR., MAHLON F. PERKINS, JR., LOLA S. LEA, DAVID A. WIER, and PAUL E. GOODSPEED, of New York, N. Y., of counsel.

METZNER, *D. J.:*

Defendants move for a stay of execution, pending appeal, of the judgment entered in favor of the plaintiff without posting the usual supersedeas bond. Practically speaking, defendant Hughes Tool Company (hereinafter called Toolco) is the party involved in this motion.

F.R.C.P. 62(d) provides that "when an appeal is taken the appellant by givng a supersedeas bond may obtain a

stay subject to the exceptions contained in subdivsion (a) of this rule. . . ." Rule 33 of the General Rules of this court provides that such bond shall be in the amount of the judgment plus 11% and an additional $250 to cover costs. Plaintiff in this antitrust action was awarded single damages of $45,870,478.65, which after trebling and adding costs and a reasonable attorney's fee amounts to $145,448,141.07. The bond would have to be in the amount of $161,447,686.59.

Rule 31(b) of the General Rules of this court provides that every bond or undertaking must either:

> "(1) be secured by the deposit of cash or government bonds in the amount of the bond, undertaking or stipulation, or be secured by (2) the undertaking of guaranty of a corporate surety holding a certificate of authority from the Secretary of the Treasury. . . ."

The third alternative provided by the rule is not applicable to this case.

It is Toolco's contention that either of the alternatives contained in Rule 31(b) "could not be effected without imposing an added penalty on [Toolco] by requiring it to engage in disruptive and time-consuming liquidation of assets or a costly and time-consuming financing program." It proposes that it either not be required to post any bond or undertaking, or that whenever the net worth of Toolco goes below three times the judgment the stay pending appeal shall be lifted.

Although the final judgment in this matter was not entered until April 14, 1970, the report of the special master recommending damages in the amount of $137,611,435.95 was confirmed by this court on December 23, 1969. Defendants apparently did nothing from that time until May

5, 1970 (the date of the order to show cause bringing on this motion) to arrange for the posting of the required bond except to make inquiry of surety companies. Appended to the order to show cause are two letters from surety companies indicating that a bond of this size could be arranged only if secured with a deposit of collateral in the form of cash or government bonds or documents of similar liquidity in the full amount of the bond. The inability of surety companies to undertake such an obligation is fully understood and appreciated by the court.

Because of the unprecedented size of the judgment against what is in essence a single defendant, the court signed the order to show cause in an attempt to see if some satisfactory arrangement could be worked out whereby the interests of the successful plaintiff could be reconciled with the understandable, practical problems facing Toolco. Hearings were held on May 11, May 20 and June 3 which were unproductive in bringing the parties close to a solution of the problem.

At the outset the brief submitted by Toolco took the position that the law was clear to the effect that the court has the power "in extraordinary circumstances such as those presented by this case, to grant a stay of execution without requiring the filing of a supersedeas bond in the ordinary form or the posting of any security." It argued that its net worth was in excess of $500,000,000 and that this was ample assurance that the plaintiff would be able, in the event of affirmance, to obtain satisfaction of its judgment without the posting of any security at the present time. In addition, it offered that a lien could be created on specific property having a value in excess of $45,000,000, the amount of the compensatory portion of the judgment. The plaintiff took the position that Rule 33,

requiring a bond in the amount of 111% of the judgment, indicates that any lower figure is most unlikely to be sufficient security for the payment of a judgment.

With the adoption of the Federal Rules of Appellate Procedure, effective July 1, 1968, Rule 73(d) of the Federal Rules of Civil Procedure, which referred to supersedeas bonds on appeals to the Court of Appeals, was repealed. It had provided, among other things, that:

> "the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on appeal, interest, and damages for delay, unless the court, after notice and hearing and for good cause shown, fixes a different amount. . . ."

These words had been inserted in the original rule in 1938 to cover situations where money judgments of enormous sums had been entered and defendants were unable to give a supersedeas bond to stay the execution of a judgment. The language allowed the court, in a case of hardship of that kind, to issue a stay of execution so that, in effect, the defendant's right of appeal would not be destroyed. The language was not transferred to any other section of the rules by the amendment of 1968, and consequently the court is faced with F.R.C.P. 62(d) and our local district Rule 33. Despite the repeal of Rule 73(d), I am of the opinion that the court has the inherent power in extraordinary circumstances to provide for the form and amount of security for a stay pending appeal, based on the conditions it finds to exist in a particular case. See 9 Moore, Federal Practice ¶208.06[1] at 1416 (2d ed. 1969).

At the first hearing on May 11, the parties adhered to their diametrically opposed positions. The plaintiff pointed

out that there was no assurance that Toolco's present net worth would continue to exist. It further took the position that during the period from December to May Toolco, with its asserted net worth, could have arranged for a loan to be used as an undertaking. Plaintiff suggested that Howard Hughes, the sole owner of the stock of Toolco, should guarantee the payment of the judgment and place his stock with the court as collateral for such guaranty.

If consideration was to be given to Toolco's proposal, plaintiff asserted that it should receive the same treatment as would be afforded any lending institution approached for a loan by Toolco. This would include certified, detailed financial statements, regular certificates by responsible officers of defendants as to the maintenance of net worth and limitations on transactions between Toolco and its 100% stockholder. However, plaintiff adhered to its view that Toolco should arrange for financing in order to secure the judgment in full.

The hearing was adjourned to May 20 with a direction to the defendants to conduct negotiations with lending institutions. Counsel were admonished to have continuing discussions so that on the adjourned date the plaintiff would not be faced with a new proposal for the first time.

The fear of the court was well founded since it appears that Toolco's new proposal was sent to plaintiff's counsel the day before the adjourned hearing. That proposal contained four provisos:

> "1. HTCo [Toolco] will furnish TWA with a Certificate by its Treasurer certifying that the present net worth of the Company, determined in accordance with generally accepted accounting principles applied on a basis consistent with prior accounting periods, without provision for the judgment, is in excess of

$500 million, namely, substantially in excess of three times the amount of the judgment.

"2. Thereafter, HTCo will provide TWA quarterly, or more frequently if desired, with a Certificate of its Treasurer certifying that the net worth of HTCo remains substantially in excess of three times the amount of the judgment.

"3. Haskins & Sells advises that they will have completed their audit for the year ended December 31, 1969 by the end of the month. HTCo will immediately engage Haskins & Sells to make quarterly audits. Shortly after such engagement Haskins & Sells will be able to complete interim audit procedures for the first quarter of 1970.

"4. HTCo will provide TWA with an appropriate Certificate of Haskins & Sells based upon such audits which will support the Treasurer's Certificate and, in addition, based upon interim auditing procedures Haskins & Sells will provide TWA from time to time with a confirmation in the form of a 'comfort letter', customarily furnished to underwriters, to the effect that nothing has come to their attention subsequent to their last audit to indicate that the net worth of the Company has been reduced to an amount which is not in excess of three times the amount of the judgment."

The letter ended with the following statement: "Based on our telephone conversation, I expect to hear from you to arrange a meeting for this afternoon to discuss the matter further." On the same date plaintiff submitted a nine-page proposal as to what it was willing to accept.

The hearing proceeded on May 20, in which counsel for Toolco outlined the discussions had with the banks. The following statement by counsel appears on page 16 of the transcript:

> "So you reduce all that and you say: What does that mean in terms of how much you can do?
>
> "And they say: Well, we don't know exactly yet but we would be happy to do it.
>
> "What will it cost?
>
> "Well, we cannot exactly tell you what terms and conditions.
>
> "But you put all those together and the only conclusion you come to is that it is not realistic. . . ."

The interesting point about all this is that Toolco never requested the banks to follow through and come up with definitive answers. It took the position that whatever the cost, it would be unduly burdensome. If Toolco had wanted financing to conclude a business transaction, I am sure that there would have been no hesitancy on its part to get the concrete answers, but somehow it did not take that tack to solve this problem. The hearing was adjourned to June 3 with a direction to Toolco to furnish the plaintiff with the audited financial statements of its operations for the year 1969 and a list of its assets worth $10,000,000 or more. This was done for the purpose of giving the plaintiff an opportunity to know what was being offered and to be in a position to evaluate whether it would be sufficient to secure its judgment.

Aside from charges and countercharges of bad faith, a large portion of the hearing on June 3 was devoted to a statement by defense counsel as to the huge capital demands being made on Toolco by its subsidiaries and affiliates. The

sum total of all this was that there could be nothing available for the plaintiff by way of cash security. Business was to continue as usual with Toolco being the sole arbiter of what it wanted to do. Cash could be converted to fixed assets which would not affect the net worth of the company as reflected on a balance sheet. However, it could certainly affect what I would call the quality of that net worth insofar as the collection of the judgment is concerned. We read every day about the liquidity squeeze.

The figures which were furnished the plaintiff indicate that in the three-month period ending March 31, 1970 the quick current assets have been reduced by a third. In addition, the court received a letter from Toolco's counsel dated May 22, 1970 stating that the court should not be surprised to read an announcement in the press, either late that day or the next day, that Toolco had acquired the Dunes Hotel for a cash consideration of $35,000,000 and that there was a contemplated transaction in which Toolco would be called upon to lay out another $11,000,000 within the next six or eight months. There are additional examples of cash commitments in the financial notes to which I need not specifically refer.

Part of business as usual must include some recognition of the rights of this plaintiff that has acquired a judgment against Toolco for violation of the antitrust laws of the United States. Toolco requests plaintiff to forgo both immediate collection of its judgment and full security for that judgment pending appeal. It must be prepared to assume some financial burden to achieve "business as usual." At the same time, I fully appreciate that under present conditions a supersedeas bond in the amount contemplated by Rule 33 is not practicable under the circumstances. I have come to the conclusion that Toolco can

arrange to post security in the form required by Rule 31(b) in the amount of $75,000,000. This shall be done on or before June 22, 1970. The balance of $86,447,686.59 shall be secured along the lines suggested by the defendants as to the maintenance of Toolco's net worth at three times the amount of such balance. The details of this arrangement shall be worked out between counsel. Each knows what the other has proposed. The court cannot be expected, on the papers before it, to come up with a satisfactory resolution embodying such detailed and intricate financial considerations. It should not be required to devote the time necessary to preside over such a conference between counsel. Obviously, there has to be flexibility on both sides for this endeavor to be successful.

Counsel are directed to meet in continuous session and appear before the court on June 16 in Room 1106 at 10:30 A.M. with a proposal in such form that any needed resolution of disputes can easily be disposed of.

So ordered.

Dated: New York, N. Y.
June 10, 1970

/s/ CHARLES M. METZNER
U. S. D. J.

Transcript of Proceedings
June 16, 1970

[1] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civil 2324

[SAME TITLE]

New York, N. Y.
June 16, 1970—10:30 a.m.

Before:

HON. CHARLES M. METZNER,
District Judge.

APPEARANCES:

CAHILL, GORDON, SONNETT, REINDEL & OHL, Esqs.,
Attorneys for Plaintiff
DUDLEY B. TENNEY, Esq., and
MARSHALL H. COX, Esq., of Counsel

DONOVAN, LEISURE, NEWTON & IRVINE, Esqs.,
Attorneys for Defendant Howard R. Hughes
JAMES V. HAYES, Esq., and
DAVID A. WIER, Esq., of Counsel

DAVIS & COX, Esqs.,
Attorneys for Defendants Hughes Tool Co. and Raymond M. Holliday
CHESTER C. DAVIS, Esq., and
MRS. LOLA S. LEA, of Counsel

Transcript of Proceedings, June 16, 1970

[2] The Clerk: TWA versus Howard R. Hughes and others.

The Court: Mr. Hayes?

Mr. Hayes: May it please the Court, I have had what I think is really an unusual experience in this case.

The Court: Don't shock me.

Mr. Hayes: I trust that your heart is in good shape. I present an order to which both sides have agreed.

The Court: I don't believe it. I really don't believe it. Where do you want me to sign it?

Mr. Hayes: On the last page, your Honor.

If your Honor would like to know what we have agreed to—

The Court: Yes, generally.

Mr. Hayes: In addition to the deposit of Government bonds to make up the $75,000,000, we have provided not only for Government bonds but also for certificates of deposit or commercial paper, provided the total amount will be $75,000,000, providing for substitutions so changes can be made, assuming, of course, that the $75,000,000 is at all times maintained.

That in the alternative, a surety bond can be put up for all or part of the $75,000,000; that there will be [3] no proceedings against anything that happens to be on deposit until ninety days after the appeal is finally concluded; that the net worth which Hughes Tool Company will maintain will be $335,000,000. Now, that is more than three times 86. It is three times 86, in substance, plus 75.

—that within 120 days of the end of each calendar quarter there will be presented to the plaintiff audited and certified balance sheets in the form that has been presented before. In addition, the Hughes Tool Company will supply to the plaintiff a schedule of all assets over

five million, with some details, such as the existence of liens.

—that within thirty days after the end of a quarter there will be quarterly certificates by the treasurer of the Hughes Tool Company as to the maintenance of the net worth of $335,000,000, plus a letter from Haskins & Sells that nothing has come to their attention up to the date of the letter; and I think we have explained to your Honor already that there is to be a continuous audit—that nothing has come to their attention up to the date of the letter which would make that statement anything but accurate.

There will be no distribution or transfer of assets by the Tool Company which would reduce its net worth to less than $335,000,000.

[4] And then the confidentiality provisions, under which, however, any confidential document may be shown to members of the firm of Cahill, Gordon and its employees, to four named personnel in Price, Waterhouse & Company, with the right of plaintiff to designate others, should one or more of them not be available, and may also show them to four named officers or directors of the plaintiff, with the right of substitution.

Now, otherwise, the rest is—

The Court: I assume this is agreeable to you, Mr. Tenney.

Mr. Tenney: Yes, your Honor. I was also surprised by it.

The Court: I don't have your signature on this order that has been consented to. Don't you think there ought to be an endorsement on the bottom of the order, "The above order consented to"—both sides signing?

Mr. Tenney: Glad to, your Honor.

Your Honor, on page 4 of the text of the order, there is a blank for the date of the order relating to the confidentiality section. Perhaps your Honor would fill in that blank.

The Court: Dated today, June 16th?

Mr. Tenney: Yes, sir. Signed, sealed and [5] delivered.

The Court: When you get around to it, send a copy for my personal files upstairs. This is a Court document.

Mr. Tenney: Yes, your Honor.

The Court: Will you file it?

Do you have something else you want signed?

Mr. Hayes: This copy has not been conformed. That is all that is needed.

The Court: Well, you can conform that.

Mr. Hayes: I trust that you can decipher my scrawl.

The Court: Is this for me?

Mr. Hayes: Yes. You said you wanted a copy.

The Court: Well, I said, when you got around to it.

Mr. Hayes: I just got around to it.

The Court: Thank you, gentlemen.

Order of Judge Metzner dated June 16, 1970

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendants Hughes Tool Company ("HTCo") and Raymond M. Holliday having moved by order to show cause dated May 5, 1970 for an order granting a stay, pending appeal, of execution of the judgment in favor of the plaintiff Trans World Airlines, Inc. ("TWA") entered herein on April 14, 1970, and that motion having come on for hearing before the Court on May 11, May 20 and June 3 and the Court having rendered an opinion on June 10, 1970, it is

ORDERED that the execution of, and any proceedings to enforce, the judgment in favor of TWA entered herein on April 14, 1970, be stayed pending the determination by the United States Court of Appeals for the Second Circuit of defendants' appeal from such judgment, provided, however,

(1) That HTCo on or before June 22, 1970 file with the Court a supersedeas bond in an amount not less than $75,000,000 to be secured in the aggregate in the manner provided by Rule 31(b) of the General Rules of this Court; it being understood that in lieu of depositing cash or government bonds (including obligations guaranteed by the government) pursuant to the provision of Rule 31(b)(1) HTCo may deposit certificates of deposit and short-term commercial paper, with the right from time to time to substitute

for such securities other similar securities so long as the total principal amount of securities is no less than $75,000,000 or to substitute in whole or in part for such deposit of securities an undertaking or guaranty under Rule 31(b)(2), it being further understood that the surety or sureties on such undertaking or guaranty shall remain liable in the amount of the undertaking or guaranty until all amounts finally determined to be due following appeal or expiration of time for appeal have been paid, and it being further understood that TWA shall take no steps to recover any such security or to enforce any such undertaking or guaranty until the expiration of a period of not in excess of 90 days following the final disposition of the appeal; and

(2) That HTCo maintains a net worth (stockholder's equity) in excess of $335,000,000.

It Is Further Ordered that the stay of execution herein provided shall terminate if at any time the net worth of HTCo should fall below $335,000,000.

It Is Further Ordered that so long as the stay of execution provided herein remains in effect HTCo shall furnish to TWA

(1) An audited balance sheet, on a quarterly basis, of HTCo and its subsidiaries, commencing with the balance sheet for quarter ending June 30, 1970, consolidated on an equity basis, in the form previously furnished to TWA for the year ended December 31, 1969, together with a certification by Haskins & Sells that such quarterly balance sheets were prepared in conformity with generaliy accepted accounting principles on a basis consistent with prior years and that

such balance sheets reflect that the net worth (stockholder's equity) of HTCo, without provision for the judgment herein, is in an amount in excess of $335,000,000. HTCo will also furnish TWA with a schedule of the principal assets reflected on the balance sheet identifying each of the fixed assets of HTCo, including the location thereof, having a book value in excess of $5,000,000 and setting forth with respect to each such asset its book value and the nature and amount of any material existing liens or encumbrances thereon, and setting forth such additional information, if any, as shall be required to permit reconciliation thereof with the last preceding, similar schedule of principal assets filed pursuant to this order. The quarterly audited balance sheets and certifications thereof by Haskins and Sells and schedules of assets shall be furnished to TWA no later than 120 days following the close of each quarter.

(2) A certificate by the Treasurer of HTCo, on a quarterly basis, commencing with the quarter ending June 30, 1970, certifying that the net worth (stockholder's equity) of HTCo as of the date of the certificate, determined in accordance with generally accepted accounting principles applied on a basis consistent with prior accounting periods, without provision for the judgment herein, is an amount in excess of $335,000,000. At the same time that HTCo furnishes TWA with its Treasurer's certificate, HTCo will also furnish TWA with a letter from Haskins & Sells to the effect that since the last audit by Haskins & Sells and to the date of such letter nothing has come to their attention to indicate that the net worth (stockholder's equity) of HTCo is in an amount which does not exceed $335,000,000. Said certificates by the

Treasurer of HTCo and said letters by Haskins & Sells will be furnished to TWA no later than 30 days following the close of each quarter.

IT IS FURTHER ORDERED that so long as the stay of execution herein provided remains in effect HTCo shall not make any distribution or transfer of its assets which would reduce its net worth below $335,000,000.

IT IS FURTHER ORDERED that the HTCo balance sheets and the schedule of assets heretofore supplied to plaintiff and all documents which HTCo may hereafter furnish to TWA pursuant to this order (the "HTCo Documents") shall be given confidential treatment in strict accordance with the conditions stated below provided that defendants shall have stamped thereon at the time of delivery to TWA a legend reading substantially as follows: "CONFIDENTIAL This document may be examined only by authorized persons and in accordance with the order of the U. S. District Court, S.D.N.Y., dated June 16, 1970."

(1) No HTCo Document may be used by or on behalf of TWA except to determine compliance by HTCo with the terms of this order or in connection with further proceedings related to such compliance and the continuance or termination of the stay of execution herein granted, provided that TWA shall not be barred from using information relating to the existence and location of HTCo assets contained in any HTCo Document in aid of proceedings to enforce the judgment herein should the stay of execution be terminated.

(2) No HTCo Document shall be reproduced or copied by TWA or its attorneys or anyone acting on their behalf. If the attorneys for TWA require addi-

tional copies, such copies shall be obtained from counsel for HTCo.

(3) No HTCo Document shall be voluntarily disclosed by attorneys for TWA to any person other than (a) members of the firm of Cahill, Gordon, Sonnett, Reindel & Ohl and its employees; (b) the following named members of Price, Waterhouse & Co., independent public accountants: John C. Biegler, Donald H. Trautlein, Dean H. Secord and Robert E. Roth, or such member of Price, Waterhouse as counsel for TWA may hereafter designate in their stead by letter to the Court and to HTCo; (c) the following named officers or directors of TWA: Charles C. Tillinghast, Jr., Chairman of the Board of Directors, Barry T. Leithead, Chairman of the Litigation Committee of the Board of Directors, L. Edwin Smart, Senior Vice President-External Affairs and Raymond R. Fletcher, Jr., Esq., Vice President and General Counsel, or such director or officer as may succeed to their positions, and be designated in their stead by counsel for TWA by letter to the Court and to HTCo, provided, however, that any such disclosures shall be made only to persons actively concerned with or engaged in the handling of proceedings relating to the stay of execution on a "need-to-know" basis, and shall be as limited as reasonably may be possible, and except that disclosures may be made to a court having jurisdiction of this action in connection with proceedings relating to the stay of execution of the judgment herein.

(4) When not in such use as is permitted by the provisions of this order, attorneys for TWA shall keep the HTCo Documents in a locked filing cabinet

and shall give access thereto only in conformity with the provisions of this order.

(5) All HTCo Documents which are delivered to this Court shall be maintained in a sealed file in the custody of this Court or its Clerk, and no such HTCo Document shall be made available to any person other than counsel of record in this action.

(6) Upon the termination of the stay of execution granted by this order, all HTCo Documents shall be promptly returned to HTCo.

(7) This order shall be binding upon each and every person who at any time has possession of or access to any HTCo Document, and no such person shall disclose any of the contents of any such document to any person not covered by the terms and intent of this order. The attorneys for TWA shall cause a copy of this order to be shown to each person to whom any HTCo Document is disclosed by them, and shall maintain a list of the names and addresses of all such persons, which list shall be made available to HTCo for inspection by it upon request.

Dated: New York, New York
June 16, 1970

/s/ CHARLES M. METZNER
U.S.D.J.

The entry of the above order is consented to:

/s/ DUDLEY B. TENNEY
Counsel for Plaintiff TWA

/s/ JAMES V. HAYES
Counsel for Defendants Hughes Tool Company and Raymond M. Holliday

Order on Consent

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

[SAME TITLE]

The Court having entered a judgment on April 14, 1970 against defendants in favor of plaintiff, and defendants having filed a notice of appeal on May 5, 1970 and plaintiff having filed a notice of appeal on May 11, 1970, the record on appeal to be transmitted to the Court of Appeals for the Second Circuit by June 22, 1970 unless a request for an extension shall be made to the Court, and the parties having made a request for an extension pursuant to Rule 11 of the Federal Rules of Appellate Procedure because additional work is necessary to assemble the large record and because of the importance of having a complete record for the purposes of appeal, it is

ORDERED that the time for transmitting the record on appeal to the Court of Appeals for the Second Circuit be extended to, and including, the 7th day of July, 1970.

Dated: New York, New York
June 18, 1970

/s/ CHARLES M. METZNER
United States District Judge

Order on Consent

This Order is hereby consented to:

/s/ Cahill, Gordon, Sonnett, Reindel & Ohl
Cahill, Gordon, Sonnett, Reindel & Ohl
Attorneys for Plaintiff
80 Pine Street
New York, New York 10005

/s/ Donovan Leisure Newton & Irvine
Donovan Leisure Newton & Irvine
Two Wall Street
New York, New York 10005

/s/ Chester C. Davis (L.S.L.)
Chester C. Davis
120 Broadway
New York, New York 10005
Attorneys for Defendants

Transcript of Proceedings
June 25, 1970

[1] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

[SAME TITLE]

Before:

HON. CHARLES M. METZNER,

D.J.

New York, June 25, 1970;
3.00 P.M.

APPEARANCES:

CAHILL GORDON SONNETT REINDEL & OHL, Esqs.,
Attorneys for Plaintiff;
Marshall H. Cox, Jr., Esq.,
Paul W. Williams, Esq., and
Michael P. Tierney, Esq., of Counsel

DONOVAN, LEISURE, NEWTON & IRVINE, Esqs.,
Attorneys for Defendants Hughes Tool Company and Raymond M. Holliday;
Mahlon F. Perkins, Jr., Esq., of Counsel.

DAVIS & COX, Esqs.,
Attorneys for Defendant Hughes Tool Company;
Chester C. Davis, Esq., and
Lola S. Lea, Esq., of Counsel.

Transcript of Proceedings, June 25, 1970

[2] Mr. Cox: Your Honor, when we were here last Monday, I indicated that my client would prefer to have the security posted by the Tool Company in the form provided for in the order of June 16, 1970, and its position is the same. However, in the event that your Honor should conclude that the proper approach to take here or a proper approach is to file a letter of credit of the sort that Hughes Tool Company has tendered, we think that there are certain changes and certain requirements that ought to accompany that letter of credit, and those are embodied in the draft order that I have handed up to you.

The Court: Obviously, I haven't read it, so you had better tell me what it is all about.

Mr. Cox: Yes, sir, I will. There is attached to the draft order a form of letter of credit, and I understand from my conversations with the defendants that the Bank of America is in accord with issuing the letter of credit in that form, and that the defendants would be in accord with that. So that the form of the letter of credit itself is now satisfactory to us.

I might say that the nature of the amendments which we made was to change the second full sentence in the letter of credit, and also to specify somewhat differently the documents that have to be presented to the bank in order [3] to permit TWA to file a sight draft and to collect upon the letter of credit.

We have also removed the provision for substitution from the letter of credit. It is now taken care of in the draft order, and we have provided that the uniform commercial code as presently enacted in the State of New York will govern the letter of credit.

In addition, we think that there are certain documents that we need, and some of these defendants have agreed to; others, they have not.

The first is an authorized written advice from the bank. They have agreed to give us that.

Nos. 2 and 3 in my form of order, certified copies of corporate action, they have agreed to give us those with respect to the letter of credit itself. They have not agreed to give us those with respect to the authorized advice.

The Court: I understand then that No. 2 is agreed to by the defendants on page 2 of the proposed order?

Mr. Davis: Bank of America said that they would furnish this. They don't understand why should it be necessary, they think it is a bad precedent for them to set, but I urged them to do it because that would satisfy TWA, [4] and as I understand at the moment, they said they would.

Mrs. Lea's letter, a copy of which has been furnished to you, sets forth what the Bank of America said they would do.

The Court: I am asking a simple question. Is No. 2 acceptable to the defendants?

Mr. Davis: That is correct.

Mr. Cox: I understand that No. 3 is substantially correct.

Mrs. Lea: Yes.

Mr. Cox: We are in controversy, sir, with respect to No. 4, No. 5.

The Court: What is the objection to No. 4, Mr. Davis?

Mr. Davis: The Bank of America does maintain an office here so they say the presentation of a letter of credit for payment may be presented in New York, but they also say that under the National Banking Act, they may not be sued in any district other than California; they don't understand

why suit should even be talked about, and they say that they do not consent to be sued elsewhere.

The Court: This is true, isn't it? A National Bank can only be sued in its home jurisdiction? That is the statute.

[5] Mr. Davis: That is what they say.

Mr. Cox: We understand that it is within the capacity of the bank to consent; that is, to waive the jurisdictional question. They could consent to sue in this jurisdiction, as we read the cases.

The reason we make this request, your Honor, is that we think that it more nearly puts us in the position we would be in if either a surety company were to post a bond, in which case if there was a default we could move against the surety company by motion in this case, not just in this court, and we would not have to begin a plenary action, as would be the case in the event of a default in the payment of this letter of credit or in the event that security was posted with the Clerk of this Court, we could send the marshal up to the fifth floor presumably to recover that security. So we feel paragraph 4 puts us much more closely—

The Court: The only question is can the bank waive jurisdiction. I don't know. I have had cases where the bank has raised the question of jurisdiction, and by raising it, obviously it is standing on its rights as to whether—

Mr. Cox: Your Honor, in that connection, I might call your attention to The First National Bank against [6] Morgan at 132 U.S. 141, which seems to be the leading and, indeed, only Supreme Court case on—

The Court: Mr. Davis, if the bank can waive jurisdiction, I think this ought to go in because under Rule 65, Point 1, the surety designates the Clerk of the Court to accept

service, and I don't see why the plaintiff here should be in any less position than it would be if it had any surety bond.

Mr. Davis: Your Honor, all I can say is I have been unable to persuade the Bank of America to agree to that. I don't have any objection to it.

The Court: You mean they won't waive?

Mr. Davis: That has been my problem. I have urged them to. I have urged them to consider it, and as of the moment, they do not think it is necessary. They say that the bank, as distinguished from anybody else, lives by meeting its commitments; and they say if the letter of credit is presented to us in New York for payment, we will pay it.

The Court: Supposing they refuse to pay it and have certain defenses to it.

Mr. Davis: It has also been difficult for me to make a bank honor its cashiers' check. They don't understand the thing, and I said, Well, that is what TWA wants; [7] they are the bank for TWA, and they don't believe TWA wants it, and so far I have been unable to persuade them. That is the only thing I can report.

The Court: I assume there are situations where they could refuse to pay and then you have a lawsuit. I don't know whether they have in history refused to pay, but other banks have.

Mr. Davis: I don't think they have ever refused to honor their own payment. They may have been in a position to refuse to pay because there was an issue as to whether they were obligated to pay, but to them the letter of credit is their cashiers' check, and they have an agency in New York State so that the letter may be presented here. I don't know why the jurisdiction isn't over them except the penalty of the statute does not permit them to be

sued here, and I suppose their problem is that to give it to TWA, somebody else would want the same thing. I suppose; I don't know. It is just something that they think is unreasonable to suggest. Mrs. Lea talked to them last on the subject.

The Court: What about No. 5?

Mr. Cox: Your Honor, we feel that there is a serious question which we would like to have resolved by the opinion of counsel, and we believe that with a document [8] of this type, in ordinary course—that is a $75,000,000 instrument—we would possibly have an opinion of outside counsel. In doing that, I don't mean to suggest that the senior counsel of the bank, whom they have tendered, is not qualified to give legal opinions, and I suppose we feel perhaps less serious about exactly who gives it. We would like an opinion. We do think that we are entitled to.

The Court: Mr. Davis, in the letter I received at noontime, isn't it indicated that senior counsel would furnish such a letter?

Mr. Davis: That is correct, your Honor. Mr. Taylor, who is a member of both the California bar and the New York bar was persuaded to give such an opinion. But he also advises Mrs. Lea, as I understand, that the bank does not have what is described as outside counsel regularly representing the bank.

The Court: I understand. I think if Mr. Taylor gives the opinion, that will be sufficient.

Mr. Cox: Your Honor, the further two points that are included in my order, further two ordering points on page 3 of the proposal that I make, deal I think largely with mechanical problems and it is largely a question of how it is done. I would prefer the way that I suggest [9] here; that is, in the event there is a substitution of some other

security for this document, I would like to have it clear that there be some approval or some action by the Court that marks what happens at that time rather than simply a substitution and a sending back, and I think there is a point there at which we perhaps may need a court order if we are going to have further substitutions for this kind of document.

The Court: I don't have to approve security if it is submitted pursuant to 31. The clerk can do that under the rules. The only substitution of security you have would be security as required in the order of June 16th in paragraph 1 on page 1, such as Rule 31(b) type of security, and the clerk can approve that. The rules specifically say so. So I understand this one.

Mr. Cox: The second provision was simply an attempt to deal with what I hope is an unlikely prospect of the appellate process—

The Court: Let us work this out now. Rule 32 specifically gives the clerk that power, all right.

Mr. Cox: The final ordering paragraph was simply to take care of the possibility of the appellate process in this case extending over a period of five years. Mr. Davis in his order has taken care of that somewhat [10] differently by requiring the tool company to substitute security in the event the letter of credit expires by its terms. I suppose the effect is the same in each instance. If our security disappears, at that time the stay will disappear. I just wanted to make that clear.

The Court: Mr. Davis's proposed order provides that if the letter of credit expires by its terms prior to the time the tool company has performed all of its obligations under the bond, the Hughes Tool Company shall substitute security in the amount of $75,000,000, and you provide that the stay of execution shall terminate.

Mr. Cox: Yes, sir.

The Court: You don't give him any chance to change the security, do you?

Mr. Cox: They would have an opportunity to substitute in advance if it is about to expire. What I am frankly concerned about is their capacity or willingness to substitute at the time that it should expire.

The Court: I suppose, Mr. Davis—I hate to contemplate this—but if five years from now, this matter is not disposed of, you would have to arrange to substitute.

Mr. Davis: For a letter of credit—

[11] The Court: There can be no objection to that last paragraph.

Mr. Davis: I think the thing is basically moot, your Honor. The reason the bank did not want to go beyond five years is because normally the bank does not loan beyond five years.

It is perfectly clear that I don't care how it is worded, that if, heaven forbid, we still have it unresolved five years from now, we will make other appropriate arrangements. I have not particularly focussed on the difference in language suggested by Mr. Cox and that suggested by Mrs. Lea. I think they both basically say the same thing.

The Court: I think as to No. 4, that I am not going to require the bank to consent to sue in the Southern District of New York. If you have to sue them out there, you can collect your costs. I think they will be able to pay it.

So let us cross out No. 4. We will excise No. 4 on page 2.

Mr. Cox: Your Honor, I believe that would require us to excise as well little Roman iii in paragraph—

The Court : Let us do one thing at a time.

Now, No. 5, let us put Mr. Taylor's name in specifically, and that will take care of that, will it not, [12] Mr. Davis?

Mr. Davis: That will be fine, your Honor.

The Court: Mr. William Taylor, senior counsel for the Bank of America. And strike out the last "independent" on the end of the first line, paragraph 5, and the second line of paragraph 5 through the word "bank."

You say subparagraph 3 of paragraph 5 appearing on page 3 has to be amended?

Mr. Cox: Yes, your Honor. I suggest putting an "and" in the third line at the bottom of page 2 in front of the little Roman ii.

The Court: Three lines from the bottom on page 2?

Mr. Cox: Yes, sir.

The Court: "In accordance with the terms," insert the word "and"?

Mr. Cox: Yes.

The Court: And strike No. 3.

Mr. Cox: Right, sir. I suppose we would strike the "and" and put a period at the end of the last word on the page.

The Court: Now, on the first full paragraph on page 3, strike the word "Court" on the fourth line and substitute the word "clerk."

[13] I will now sign the order unless anybody has any objection.

Mr. Davis: Mrs. Lea tells me that the mail from California is not necessarily prompt, and while the Bank of America has advised us that if TWA insisted, they would immediately issue a new letter of credit and immediately prepare these documents, I cannot say that we are going to receive them by July 2nd, and it is just a question of the mail.

Now, if counsel is concerned about that, I will put them in telephone contact with Mr. Taylor telling them the stuff is in the mail, but it will get here when it gets here.

Mr. Cox: Mr. Davis, I selected July 2 because it is the end of next week.

Mr. Davis: If it gets here by July 2, I will give it to you when it gets here.

Mr. Cox: I am satisfied if it is another reasonably soon date later than that, your Honor.

The Court: July 12th?

Mr. Davis: That will be plenty of time.

The Court: I will change July 2 on the 10th line on the first page to July 12.

May I sign it now?

[14] Mr. Davis: It appears twice, your Honor.

The Court: You are right, and before the colon on that page, three lines from the bottom.

Today is June 25th. Here is the order (handing to counsel).

Mr. Cox, will you send up a copy of that to me?

Mr. Cox: Yes, sir.

The Court: Thank you.

Order by Judge Metzner
June 25, 1970

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

[SAME TITLE]

A five-year irrevocable Letter of Credit in the amount of $75,000,000 issued by Bank of America National Trust and Savings Association (the "Bank") in favor of plaintiff Trans World Airlines, Inc. ("TWA") in the form annexed hereto as Exhibit A (the "Letter of Credit") is hereby approved as a substitute, during the term thereof but no longer, for the security required to be provided by defendant Hughes Tool Company ("HTCo") under the provisions of the Order of the Court of June 16, 1970, provided that the Letter of Credit is filed with the Clerk of the Court no later than July 12, 1970, and the Clerk is directed to retain the Letter of Credit in his custody until the Judgment herein becomes final by appeal or expiration of time for appeal whereupon the Clerk is directed to transmit the Letter of Credit to the attorneys for TWA, provided further, however, that HTCo furnishes to TWA on or before July 12, 1970:

1. The authorized written advice from the Bank to TWA that such Letter of Credit has been issued;

2. Certified copies of the corporate action taken by the Bank to authorize the issuance and delivery of and performance under the Letter of Credit and to authorize the authorized written advice that such Letter of Credit has been issued;

3. Certificates of Incumbency with respect to each of the officers of the Bank who have executed the Letter of Credit and the authorized written advice referred to in paragraph 1 hereof;

• • •

5. An unconditional written opinion of W. H. Taylor, Jr. Senior Counsel for the Bank of America that (i) the issuance of the Letter of Credit by the Bank does not violate any provision of law or the charter of the Bank and has been duly authorized by all necessary corporate action on the part of the Bank and said Letter of Credit constitutes the valid and binding agreement of the Bank enforceable in accordance with its terms, and (ii) the authorized written advice referred to in paragraph 1 hereof has been duly authorized and issued by the Bank.

It Is Further Ordered that, in the event that HTCo files with the Court security in the amount of $75,000,000 as provided by the Order of the Court of June 16, 1970, upon approval of such security by the Clerk, the Clerk shall transmit the Letter of Credit to the Bank for cancellation.

It Is Further Ordered that, in the event that the Letter of Credit expires in accordance with its terms before HTCo has filed with the Court security in the amount of $75,000,000 as provided in the foregoing paragraph of this Order, the stay of execution provided in the Order of the Court of June 16, 1970 shall terminate.

Dated: New York, New York
June 25, 1970

/s/ Charles Metzner
U.S.D.J.

Exhibit A Annexed to Order of Judge Metzner

[BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION LETTERHEAD]

, 1970

Letter of Credit No. LA .....

Re: Trans World Airlines, Inc. v. Howard R. Hughes, Hughes Tool Company and Raymond M. Holliday
United States District Court
S.D.N.Y.—61 Civ. 2324

Trans World Airlines, Inc.
605 Third Avenue
New York, New York 10016

Gentlemen:

We understand that a judgment was entered in the United States District Court for the Southern District of New York on April 14, 1970 in the matter of *Trans World Airlines, Inc.* v. *Howard R. Hughes, Hughes Tool Company and Raymond M. Holliday,* 61 Civ. 2324, in favor of plaintiff Trans World Airlines, Inc. and against defendants Hughes Tool Company and Raymond M. Holliday in the sum of $145,448,141.07 and that defendants Hughes Tool Company and Raymond M. Holliday have appealed said judgment to the United States Court of Appeals for the Second Circuit. We understand that this Letter of Credit is to be furnished pursuant to the Order of the Court dated June 16, 1970, of which we have received a copy, providing for the filing of a supersedeas bond that the judgment in favor of Trans World Airlines, Inc. will be satisfied in full, together with costs, interest and dam-

ages for delay, if any be awarded, which bond is to be secured in an amount no less than $75,000,000.

We hereby establish our Letter of Credit in your favor and authorize you to draw on us up to an aggregate amount of $75,000,000, available by your draft at sight accompanied by (a) a certified copy of a judgment which has become final by appeal or expiration of time for appeal no less than 90 days prior to demand for payment under this Letter of Credit, (b) a certified copy of the Transcript of Judgment which does not, on its face, show that the judgment, together with costs, interest and damages for delay, if any, has been satisfied in full, and (c) a certification by you stating that the judgment, together with costs, interest and damages for delay, if any, has not been fully satisfied and stating how much remains to be paid to Trans World Airlines, Inc. before such judgment together with costs, interest and damages for delay, if any, will be fully satisfied.

This Letter of Credit shall be irrevocable for a period of five years from the date hereof.

This Letter of Credit is governed by the Uniform Commercial Code as presently enacted in the State of New York.

Yours very truly,

Authorized signature

Second authorized signature

Opinion and Order of Judge Metzner
May 23, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

[SAME TITLE]

APPEARANCES:

Cahill, Gordon, Sonnett, Reindel & Ohl
Attorneys for Plaintiff
80 Pine Street
New York, N. Y. 10005
Dudley B. Tenney
Paul W. Williams
Marshall Cox
Of Counsel

Chester C. Davis
Attorney for Defendants
One State Street Plaza
New York, N. Y. 10004

METZNER, *D. J.*:

The plaintiff seeks to enter a judgment in this action on remand from the Supreme Court which would have the effect of amending the mandate of the court.

The litigation has lasted for twelve years and is fully discussed in many reported opinions. Insofar as the instant problem is concerned, the pertinent facts may be briefly stated.

Opinion and Order of Judge Metzner
May 23, 1973

On February 7, 1963, this court denied the defendants' motion to dismiss the complaint. 214 F. Supp. 106. The order was affirmed by the Court of Appeals on June 2, 1964. 332 F.2d 602. The Supreme Court originally granted certiorari, 379 U.S. 912, but after argument dismissed the writ as improvidently granted. 380 U.S. 248 (1965).

The inquest ordered on defendant Hughes' default then proceeded and on December 23, 1969 this court filed its opinion confirming the report of the special master awarding damages amounting to $137,611,435.95. 308 F. Supp. 679. Judgment was thereafter entered, and on September 1, 1971 the Court of Appeals affirmed the judgment. 440 F.2d 51. On January 10, 1973 the Supreme Court reversed the judgment holding the transactions in question to be immune from the antitrust laws, that primary jurisdiction lies in the Civil Aeronautics Board, and that the complaint in this action be dismissed. 41 U.S.L. Week 4131 (January 10, 1973).

The mandate issued from the Supreme Court directed that the judgment of the Court of Appeals be reversed and the cause "remanded to the United States Court of Appeals for the Second Circuit for further proceedings in conformity with the opinion of this Court." The Second Circuit then issued its mandate which directed that the "action is remanded to said district court for further proceedings in conformity with the opinion of the Supreme Court of the United States . . . ."

The opinion of the Supreme Court stated explicitly that the complaint must be dismissed. Plaintiff desires this court to enter a judgment dismissing the complaint without prejudice to its nonfederal claims of breach of fiduciary duty. The complaint in this court consisted of two

claims for violation of the federal antitrust laws and a pendent state claim for tortious interference with the business of TWA based on the same facts as set forth in the first and second claims. The latter is not the state claim that TWA is interested in.

An action seeking relief for breach of fiduciary duty was instituted in the Chancery Court of Delaware in 1962 and has been held in abeyance pending determination of TWA's claim of violation of the antitrust laws. In other words, having failed to obtain treble damages, TWA now seeks to be free to pursue its remedy to recover single damages on the same facts.

TWA is of the opinion that a judgment dismissing the complaint in this court might be held to be a dismissal on the merits, pursuant to Fed. R. Civ. P. 41(b), and thus a bar to the continued prosecution of the state court action. It urges that if it had asserted the state court claim as pendent to the antitrust claims, the dismissal of the latter would have been without prejudice to the pendent claim. *See United Mine Workers of America* v. *Gibbs,* 383 U.S. 715, 726 (1966); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit,* 454 F.2d 1292 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972); *O'Neill* v. *Maytag,* 339 F.2d 764, 766 n.3 (2d Cir. 1964). Finally, it argues that the Court was only concerned with the question of jurisdiction of the asserted federal claims and never intended that any state claims be foreclosed. At this point I should indicate that while the decisions speak in terms of "jurisdiction," they properly should cast the issue in terms of "failure to state a claim." *Danna* v. *Air France,* 463 F.2d 407, 408 n.4 (2d Cir. 1972).

It is clear that under Rule 41(b) a dismissal of the complaint, certainly as far as the federal claims are concerned,

would be upon the merits. However, it does not follow that such a dismissal would be a bar to the nonfederal claims. In the *Calderone* case, *supra*, the complaint alleged federal claims and pendent state claims. The federal claims were dismissed on motion for failure to state a claim. The court pointed out that this action did not leave the plaintiff without remedy:

> "Since federally-based claims were properly dismissed prior to trial, however, the pendent state claims must also be dismissed and the plaintiff relegated to the state courts for relief." 454 F.2d at 1297.

Interestingly enough, the order entered in that case did not dismiss the pendent claims without prejudice. I gather from this that such a safeguard is not necessary to protect whatever rights plaintiff may have in this regard. It might also be argued that standing alone the court is without jurisdiction of the state claims and thus the dismissal is for lack of subject matter jurisdiction which is not on the merits under Rule 41(b).

Finally, a reading of the Supreme Court opinion clearly indicates what the issue was before the Court if a claim is ever made in the state court that the judgment to be entered here is a bar to that action.

This court is obviously reluctant to amend the mandate of the Supreme Court, especially when there is doubt that such action is necessary to protect the interests of the parties. Furthermore, the authority relied on by plaintiff to justify its request, *In re Sanford Fork and Tool Company*, 160 U.S. 247, 255-56 (1895), is not in point. While the Court there indicates that the lower court may consider and decide any matters left open by the mandate,

it expressly states that the court cannot vary it, "even for apparent error, upon any matter decided on appeal; . . ." The mandate in this case clearly calls for a dismissal of the complaint and this court must enter such a judgment.

The Clerk is directed to enter a judgment dismissing the complaint with costs.

So ordered.

Dated: New York, N. Y.
May 23, 1973

/s/ CHARLES M. METZNER
U.S.D.J.

Bill of Costs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

[SAME TITLE]

Judgment having been entered in the above entitled action on the 23rd day of May, 1973, against TRANS WORLD AIRLINES, INC. the clerk is requested to tax the following as costs:

Fees of the clerk	$ .....
Fees of the marshal	.....
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	19,329.34
Fees and disbursements for printing	44,534.82
Fees for witnesses (itemized on reverse side)	.....
Fees for exemplification and copies of papers necessarily obtained for use in case	65,066.72
Docket fees under 28 U. S. C 1923	.....
Costs incident to taking of depositions	35,136.37
Cost as shown on Mandate of Court of Appeals	71,521.42
Other Costs (Please itemize)	
Costs of Bond	1,797,404.83
Special Masters Fees and Disbursements	153,925.74
Total	**$ 2,186,919.24**

Bill of Costs

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

I, CHESTER C. DAVIS do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was on September 17, 1973, personally served on Cahill, Gordon & Reindel, attorneys for plaintiff Trans World Airlines, Inc.

Please take notice that I will appear before the Clerk who will tax said costs on September 20, 1973 at 10:00 A.M.

/s/ CHESTER C. DAVIS
Attorney for Hughes Tool Company
and Raymond M. Holiday

Subscribed and sworn to before me this 17th day of September A.D. 1973 at New York, New York.

/s/ GRACE H. YOSHIZAKI

GRACE H. YOSHIZAKI
Notary Public, State of New York
No. 43-4365200
Qualified in Richmond County
Certificate filed in New York County
Commission Expires March 30, 1975

Judgment for Costs

(See Opposite) ☞

10/16 Form A. O. 133 (1-63)

Objections to taxation is noted
Raymond F. Burghardt
Clerk

United States District Court
for the
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT FILED OCT 16 1973 S. D. OF N. Y.

TRANS WORLD AIRLINES, INC.

vs.

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Docket as Jud. #73,840
CIVIL ACTION FILE NO.
61 CIV. 2324
Metzner, J.

Judgment having been entered in the above entitled action on the 23rd day of May, 1973, against TRANS WORLD AIRLINES, INC. the clerk is requested to tax the following as costs:

BILL OF COSTS

Fees of the clerk	$	
Fees of the marshal		
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	~~19,329.34~~	18,902.75
Fees and disbursements for printing	~~44,534.82~~	20,670.91
Fees for witnesses (itemized on reverse side)		
Fees for exemplification and copies of papers necessarily obtained for use in case	65,066.72	Disallowed
Docket fees under 28 U. S. C. 1923		
Costs incident to taking of depositions	~~35,136.37~~	22,739.65
Cost as shown on Mandate of Court of Appeals	~~71,521.42~~	Paid
Other Costs (Please itemize)		
Costs of Bond	~~1,707,404.83~~	1,768,616.40
Special Masters Fees and Disbursements	~~153,925.74~~	110,659.44
Total	~~$2,186,919.24~~	1,941,639.15

State of NEW YORK
County of NEW YORK } ss:

I, CHESTER C. DAVIS do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was ~~mailed~~ on September 17, 1973, personally served on Cahill, Gordon & Reindel, attorneys for plaintiff Trans World Airlines, Inc.

Please take notice that I will appear before the Clerk who will tax said costs on September 20, 1973 at 10:00 A.M.

Attorney for Howard R. Hughes Tool Company and Raymond M. Holliday

Subscribed and sworn to before me this 17th day of September A. D. 19 73
at New York, New York

Grace H. Goshigaki
Notary Public, State of New York
No. 43-4365703
Qualified in Richmond County
Certificate filed in New York County
Commission Expires March 30, 1974
Notary Public.

Costs are hereby taxed in the amount of $1,941,639.15 this 11 day of October, 1973, and that amount included in the judgment.

Raymond F. Burghardt
Clerk.

By
Deputy Clerk.

NOTE: SEE REVERSE SIDE FOR AUTHORITIES ON TAXING COSTS.

Raymond F. Burghardt, Clerk
By Deputy Clerk

Notice of Motion to Retax Costs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324 (CMM)

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that, upon the judgment for costs herein, upon the annexed affidavit of Dudley B. Tenney and upon all of the papers filed and proceedings had and taken herein, the undersigned will move the Court, before Hon. Charles M. Metzner, United States District Judge for the Southern District of New York, at the United States Court House, Foley Square, New York, New York, on a day and at a time and place to be fixed by the Court, pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, for review of the action of the Clerk on October 16, 1973 in taxing costs herein, for an order striking out all of the items taxed by the Clerk against the plaintiff except for the award of reasonable premiums for security for defendants' supersedeas bond, and for an order, as to that item, retaxing the amount of the premiums to be taxed.

Dated: New York, New York
October 23, 1973

CAHILL GORDON & REINDEL
By /s/ DUDLEY B. TENNEY
A Member of the Firm
Attorneys for Plaintiff
Trans World Airlines, Inc.
Office & P.O. Address:
80 Pine Street
New York, New York 10005
(212) 944-7400

Notice of Motion to Retax Costs

To:

Davis & Cox
Attorneys for Defendants
Hughes Tool Company and
Raymond H. Holliday
Office & P. O. Address:
One State Street Plaza
New York, New York 10004

Affidavit of Dudley B. Tenney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324 (CMM)

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

DUDLEY B. TENNEY, being duly sworn, deposes and says:

1. I am an attorney and a member of the Bar of this Court, and a member of the firm of Cahill Gordon & Reindel, attorneys for plaintiff Trans World Airlines, Inc. ("TWA"). I am fully familiar with all of the proceedings heretofore had herein, and I make this affidavit in support of TWA's motion for review and retaxation of the costs taxed by the Clerk against TWA on October 16, 1973.

2. This Court entered the judgment dismissing the complaint herein, pursuant to the mandate of the United States Supreme Court, on May 23, 1973. On September 17, 1973, defendants Hughes Tool Company ("Toolco") and Raymond M. Holliday filed their verified bill of costs, seeking to recover as statutory costs the amount of $2,186,919.24.* TWA filed a summary of its objections to taxation of these costs and an affidavit of Marshall Cox with respect to certain of TWA's objections. (Copies of the summary of objections and Cox affidavit are respectively Exhibits A and B hereto.)

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* This figure included the costs shown on the mandate of the Court of Appeals. That amount was paid by TWA prior to the Clerk's taxation on October 16, 1973.

3. Hearings on defendants' bill of costs were held before Mr. Werner A. Koehler, Deputy Clerk, on October 1 and October 16. On October 16, 1973, having heard TWA's general and specific objections and defendants' responses thereto, the Clerk taxed costs in the amount of $1,941,639.15 against TWA. A copy of the judgment for costs entered by the Clerk in this amount is Exhibit C hereto.

4. As set forth in the accompanying memorandum of law, it is TWA's position that no costs, except for an amount equivalent to reasonable premiums upon a surety bond in the amount of $75 million, should have been taxed against it in this Court. This applies to $173,022.75 of the costs taxed by the Clerk against TWA.

5. With respect to the $1,768,616.40 taxed by the Clerk for defendants' "Cost of Bond", TWA concedes that defendants are entitled to recover an amount equivalent to the premiums on a supersedeas bond in the amount of $75 million as an appellate cost taxable in this Court under Rule 39(e) of the Federal Rules of Appellate Procedure. However, defendants have failed to provide adequate information to show that the entire amount of these costs is properly to be charged against TWA.

6. TWA requested in its summary of objections before the Clerk (Exhibit A, ¶¶ 10-12) and by letter to defendants' counsel on October 5, 1973 (a copy of which is Exhibit D hereto) that information be provided to show the propriety of allocating the various items of costs connected with the supersedeas bond against TWA. Defendants responded by letter on October 15, 1973 (a copy of which is Exhibit E hereto), declining to produce some of

the information requested and agreeing to produce for inspection under claim of secrecy the available documents comprising the credit agreement underlying the letter of credit.

7. With respect to the charges for quarterly audits, defendants also provided, in addition to the letter from Gene Harris of Haskins & Sells attached as Exhibit B-14 to defendants' Motion for Allowance of Costs (a copy of which letter is Exhibit F hereto), two letters from Mr. Harris dated October 12 and October 15 (respectively Exhibits G and H hereto) and a letter to Toolco from James L. Williams of Haskins & Sells dated March 1, 1973 (a copy of this letter is Exhibit I hereto).

8. As is stated more fully in our letter to defendants' counsel dated October 19, 1973 (a copy of which is Exhibit J hereto), the information provided to TWA with respect to both the letter of credit charges and the auditing expenses still fails to answer the questions which caused us to make the original request for information in our October 5 letter.

9. Therefore, it is respectfully submitted that TWA's motion should be granted in its entirety.

/s/ DUDLEY B. TENNEY
Dudley B. Tenney

(Sworn to October 23, 1973.)

Exhibit A Annexed to Affidavit of Dudley B. Tenney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324 (CMM)

TRANS WORLD AIRLINES, INC.,

Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

SUMMARY OF PLAINTIFF'S OBJECTIONS TO TAXATION OF COSTS AGAINST IT

Plaintiff Trans World Airlines, Inc. ("TWA") makes the following objections to defendants' bill of costs:

General Objections

1. TWA is the prevailing party on defendants' counterclaims in this action, and in such circumstances each side must bear its own statutory costs. *Srybnik* v. *Epstein*, 230 F.2d 683 (2d Cir. 1956); *Brunswick-Balke-Collender Co.* v. *American Bowling & Billiards Corp.*, 150 F.2d 69 (2d Cir.), *cert. denied*, 326 U.S. 757 (1945).* If this rule is not con-

* TWA does not include in this general objection the cost of premiums on the supersedeas bond, provided the appropriate amount thereof can be ascertained. See par. 10 of TWA's Specific Objections *infra*.

sidered applicable to statutory costs incurred throughout the period of this litigation, it is at least applicable to those costs incurred prior to the Supreme Court's dismissal of certiorari with respect to the counterclaims on March 8, 1965.*

2. Defendants' repeated refusals to comply with the Court's several discovery orders, which led to the entry of default judgments against them on the complaint and upon defendants' counterclaims, entitle TWA to a setoff in the amount of $4,602.65, under Rule 37 of the Federal Rules of Civil Procedure, as costs caused by defendants' failure to comply with lawful discovery orders.

Specific Objections

TWA makes the following additional objections to specific items in defendants' bill of costs:**

Fees for the court reporter

1. Under 28 U.S.C. § 1920, fees of the court reporter may be taxed only with respect to "all or any part of the stenographic transcript necessarily obtained for use in

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* The following items in defendants' verified bill of costs (a copy of which is attached hereto), relate to costs incurred in the period prior to March 8, 1965, to the extent indicated as to each item:

Fees of court reporter—$507.87
Fees and disbursements for printing—$20,650.47
Fees for exemplifications and copies of papers—$5,840.94
Costs incident to taking of deposition—$35,136.37
Special Masters Fees and Disbursements—$11,787.50

** The headings of these specific objections are taken from defendants' bill of costs, each item of which is treated in order.

the case." The Court ruled in 1970 that TWA, upon a sufficient showing of necessity, was entitled to recover as taxable costs its share of the original transcript of the damage hearings, plus three additional copies (312 F. Supp. 478, 485). Since TWA filed the official copy of the transcript of the damage hearing with the Court, defendants are not entitled to more than two copies of the transcript, in addition to their share of the cost of the original transcript, and therefore fees for any additional copies should not be taxed against TWA.

2. Defendants have not provided any basis for the Clerk to determine the per copy cost at ordinary rates of any copies of the transcript which defendants may be able to show to have been necessary, and therefore the entire amount of this item should be denied.

Fees and disbursements for printing

3. Neither the rules of this Court nor any specific order of the Court required the printing of defendants' memorandum in support of motion to dismiss the complaint, or defendants' answering brief. TWA, upon a sufficient showing of necessity for such printing costs, was limited by the Court in 1970 to taxing the cost of 50 copies thereof (312 F.Supp. 478, 485). Defendants have made no showing of necessity for any of the up to 200 copies of these materials.

4. Defendants have shown no necessity for printing their application for leave to appeal, and the exhibits thereto. Further, such expenditures are properly appellate costs and TWA was denied such costs by the Court in 1970 (312 F.Supp. 478, 485).

Exhibit A Annexed to Affidavit of Dudley B. Tenney

5. Defendants' answer and counterclaim were printed for use in a proceeding before the Civil Aeronautics Board and the cost thereof is thus not taxable against TWA in this action.

6. TWA does not object to taxation against it of defendants' share of the cost of printing the Special Master's Report.

Fees for exemplification and copies of papers

7. 28 U.S.C. § 1920 permits fees for exemplification and copies of papers to be taxed only if "necessarily obtained for use in the case." Although defendants' supporting papers fail to give sufficient details to identify most of the materials reproduced, it appears that this item relates to documents reproduced for discovery purposes. The statute does not contemplate taxation of the cost of such reproductions absent their necessary use at trial, which showing defendants have failed to make.

Costs incident to taking of depositions

8. In 1970 TWA, upon a sufficient showing of necessity, was awarded as taxable costs its share of the original deposition transcripts provided to the Special Master, and three additional copies thereof. Defendants have made no showing that the numerous copies of depositions (in the case of the Tillinghast deposition defendants seek to tax costs for 13 copies) and transcripts of hearings before Special Master Rankin for which defendants seek to recover were necessary to their case. Since defendants do not provide a basis for the Clerk to compute the per copy cost at normal rates of the copies, if any, which defendants may

be able to show were necessary, this entire item must be denied.

Costs as shown on Mandate of Court of Appeals

9. TWA does not object to this item in defendants' bill of costs.

Costs of Bond

10. TWA objects to that portion of this item covering interest of one-half of one percent on the amount of the $75,000,000 letter of credit filed by defendants in lieu of a surety bond, which amount totals $1,015,625, unless defendants submit the full credit agreement with the Bank of America upon which these payments were based, together with the details of any other credit or security arrangements between Toolco or Howard R. Hughes and the said Bank of America which were in existence during the period when the letter of credit was in effect, as well as such arrangements which existed in the period from the filing of the Special Master's Report on September 21, 1968 to the inception of the letter of credit. If satisfied by inspection of the credit agreement and such further information with respect to other credit or security arrangements that the interest is equivalent to premiums paid to a surety company for a supersedeas bond, TWA will consider withdrawal of this objection.

11. The additional charges paid by defendants to the Bank of America with respect to the underlying financing of the letter of credit are sums paid on a private contract. Since defendants chose this method of providing the security required by the Court's order, these costs should not

be taxed against TWA in the absence of information about their relationship to charges for similar arrangements between the Bank of America and Toolco or Howard R. Hughes for the period stated in paragraph 10.

12. Defendants are not entitled to tax any auditing expenses against TWA. This procedure was volunteered by defendants in lieu of the security to which TWA was entitled under the law. Further, defendants have failed to demonstrate these expenditures were different from or in excess of their regular yearly expenses for annual audits by the same accounting firm, and they have not taken into account the amount to which expenditures on other special audits were reduced by reason of the arrangements made in this action.

13. Defendants may not tax as costs attorneys fees, whether for the entire case or any part thereof, in the absence of statute or court rule, and this portion of the item must therefore be denied.

14. There is no authority for the recovery of "miscellaneous expenses" with respect to negotiating security for a stay of execution.

Special Masters Fees and Disbursements

15. Defendants are not entitled to tax against TWA that portion of this item representing the taxable costs assessed against defendants upon the dismissal with prejudice of their counterclaims in favor of the additional defendants, since defendants were the losing party on their counterclaims not only as against the additional defendants, but also against TWA.

Exhibit A Annexed to Affidavit of Dudley B. Tenney

16. With respect to the remainder of this item, see paragraph 1 of the General Objections, *supra*.

Dated: New York, New York
October 1, 1973

Respectfully submitted,

CAHILL GORDON & REINDEL

By /s/ DUDLEY B. TENNEY
A Member of the Firm
Attorneys for Plaintiff
Trans World Airlines, Inc.
Office & P.O. Address:
80 Pine Street
New York, New York 10005
(212) 944-7400

Exhibit B Annexed to Affidavit of Dudley B. Tenney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324 (CMM)

TRANS WORLD AIRLINES, INC.,

Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

MARSHALL COX, being duly sworn, deposes and says:

1. I am a member of the firm of Cahill Gordon & Reindel, counsel for plaintiff Trans World Airlines, Inc. ("TWA"), and submit this affidavit in support of TWA's objections to taxation of costs against it.

2. My firm was retained in this matter by TWA on March 21, 1961. I began working on this matter very shortly thereafter and have continuously participated in it since that time, initially as an associate of the firm and since January 1, 1968 as a partner. I am familiar with all of the proceedings in this action.

3. There is annexed as Exhibit A a copy of an affidavit sworn to by me on December 30, 1969 and submitted to this Court on December 31, 1969 in support of "Application of Trans World Airlines, Inc. to Recover Its Cost of Suit Including a Reasonable Attorney's Fee" ("TWA's Applica-

tion to Recover Cost of Suit").* That affidavit set out in detail the expenses, other than attorneys' fees, incurred by TWA in prosecuting this lawsuit and defending against the counterclaims of defendant Hughes Tool Company ("Toolco"), all of which TWA sought to recover. In paragraphs 7 and 8 of Exhibit A, there are set out separately those specific items of expense which TWA sought to recover as ordinary taxable costs as the prevailing party in the suit, in the event that its application for recovery of all its expenses should be denied.

4. In its April 13, 1970 opinion dealing with TWA's Application to Recover Cost of Suit (reported at 312 F. Supp. 478), this Court ruled TWA was not entitled to recover its full expenses but was entitled to recover its "ordinary taxable costs", in addition to an attorney's fee.

5. Defendants objected to three specific items claimed by TWA as taxable costs in paragraph 7 of Exhibit A. The items to which they objected to were TWA's attempts to tax as costs (i) its expenditures for "Services in Connection with Attempts to Serve Hughes", (ii) its expenditures for certain "Printing Bills" and for printing more than 50 copies of any printed document, and (iii) its expenditures for more than two copies of the "Transcript of Damage Hearings before Special Master Brownell" in addition to TWA's share of the cost of the transcript provided to the Special Master. The Court ruled as follows with respect to these objections:

> "Alternatively, plaintiff requests $396,596.43 as taxable costs. Included in this sum is $28,342.63 claimed

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* Exhibit A was subsequently supplemented and revised in certain respects, none of which is presently material, by my Supplemental Affidavit sworn to on January 20, 1970 and submitted to the Court.

for services in connection with attempts to serve Hughes. These charges are based on payments to lawyers and private investigators in several parts of this country and Mexico City. To the extent that these payments are allocable to attempts to serve a summons on Hughes as a defendant in this action, they clearly are not taxable costs against Toolco. They also are not taxable for that portion of the services involved in attempting to serve a witness subpoena on Hughes. § 1920 provides for taxation of fees of witnesses, not the expense of searching out the witness. On the record it is clear that Hughes and Toolco were one and the same, and therefore service of notice to take deposition would have sufficed for plaintiff's purposes. Consequently, this item is disallowed.

"The sum of $19,145.20 for printing costs in the Court of Appeals and the Supreme Court is not taxable, nor are the costs applicable to printing more than 50 copies of the other documents.

"As to the transcript of damage hearings, plaintiff may only tax its share of the cost of transcript furnished to the special master plus three additional copies." (312 F.Supp. at 485)

TWA's taxable costs were allowed in the amount of $336,707.12.

6. The costs so allowed to TWA related both to prosecution of its complaint and to defense against Toolco's counterclaims, and accordingly included expenses in this Court through 1969. In fact TWA has been the prevailing party only with respect to the counterclaims. This Court has previously determined that ordinary taxable costs should be allowed with respect to the successful defense against the counterclaims, when judgment was entered in

1966 dismissing those counterclaims with prejudice. At that time such statutory costs were taxed in favor of the third party "additional defendants".

7. I have reviewed the records with respect to those expenditures which TWA was allowed to recover as ordinary taxable costs by this Court's opinion of April 13, 1970. I ascertained from the available records that of the total costs allowed at least $124,032.66 represented expenses incurred in connection with proceedings before this Court prior to May 28, 1963. Such expenses related to TWA's defense against Toolco's counterclaims as well as to prosecution of TWA's complaint. The details of such amounts are set forth below in the same order and under the same headings as those employed in paragraph 7 of Exhibit A:

Reproduction of Documents [28 U.S.C. § 1920(4)]	$ 77,859.47*

* The following table details the elements included in the total shown for Reproduction of Documents, broken down under the headings used in paragraph 6.C. of Exhibit A (pp. 5-6):

National Reproductions, Inc.	$50,021.12
Dunnington, Bartholow & Miller [Documents reproduced from files of Dillon, Read & Co. Inc.]	1,648.80
Mercury Reproductions Service	2,383.84
Manhattan Reproduction Service Corp.	378.30
Recordak Corporation [Microfilming and copies of documents produced by Toolco in response to Rule 34 motions]	6,980.16
Recordak Corporation [Microfilming and copies of documents produced by Toolco in response to Rule 34 motions (originally paid by Cahill Gordon & Reindel as a disbursement)]	13,337.97
Other disbursements of Cahill Gordon & Reindel for reproduction costs of documents produced by defendants, additional defendants, witnesses and others pursuant to subpoena and otherwise	3,109.28

Exhibit B Annexed to Affidavit of Dudley B. Tenney

Fees and Disbursements of Special Master J. Lee Rankin [The fees and disbursements of the Special Master are taxable costs as provided in this Court's orders of February 7, 1962 and May 10, 1962.]		17,287.50
Expenditures by four lawyers for travel to Los Angeles and return and expenses in connection with said travel for the purpose of selecting and estabing an office to be used in connection with the Hughes Deposition [These are taxable costs, pursuant to Fed.R.Civ.P. 37 and this Court's orders of May 17, May 18 and July 11, 1966 allowing costs to the additional defendants on counterclaims]		$ 3,561.24
Other expenditures made in connection with the scheduled Hughes deposition: [These expenditures made in connection with taking Hughes's deposition are taxable costs as provided in Fed. R.Civ.P. 37 and in this Court's orders of May 17, May 18 and July 11, 1966 allowing costs to the additional defendants on the counterclaims]		
Spring Street Realty Co. [Rental of Office Space]	$425.00	
A-1 Desk Refinishing Co. [Rental of furniture]	477.88	
John P. Filbert Co., Inc. [Rental of furniture]	96.93	

Exhibit B Annexed to Affidavit of Dudley B. Tenney

Office Machines Inc.	41.60	1,041.41
Southern District Court Reporter [28 U.S.C. §1920(2)]		1,493.39
Transcript of Depositions and other proceedings before Special Master Rankin [TWA's share of cost of transcript furnished to Special Master Rankin plus 3 copies]		22,789.65
		$124,032.66

Each of the foregoing items includes only expenditures made prior to May 28, 1963 and previously taxed against defendants as costs.

9. The third and fourth items in the foregoing table, $3,561.24 and $1,041.41 respectively, while not ordinarily taxable, were as I have indicated specifically ruled by this Court to be taxable under Fed.R.Civ.P. 37.

/s/ MARSHALL COX
MARSHALL COX

(Sworn to September 28, 1973.)

Exhibit A Annexed to Exhibit B Annexed to Affidavit of Dudley B. Tenney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

AFFIDAVIT

MARSHALL H. COX, JR., being duly sworn, deposes and says:

1. I am a member of the firm of Cahill, Gordon, Sonnett, Reindel & Ohl ("Cahill Gordon"), counsel for the plaintiff, Trans World Airlines, Inc. ("TWA"), and submit this affidavit in support of TWA's application that it recover its "cost of suit" herein, as provided in Section 4 of the Clayton Act (15 U.S.C. § 15).

2. As is further described in the affidavit of Dudley B. Tenney which is also being submitted in support of TWA's application, Cahill Gordon was first retained in this matter by TWA on March 21, 1961. I began working on this matter shortly thereafter and have continuously

participated in it since that time, initially as an associate of the firm and since January 1, 1968 as a partner. I am familiar with all of the proceedings herein.

3. By its application, TWA is seeking to recover both attorneys' fees and the other expenses incurred by it in prosecuting this suit. Some of the expenses of this suit have been billed directly to and paid by TWA and other expenses were incurred by and billed to Cahill Gordon. In accordance with Cahill Gordon's usual practice, bills to it for expenditures made on behalf of TWA in this litigation either have been forwarded to TWA for payment or have been paid by Cahill Gordon, recorded in its accounts and billed to TWA as disbursements. Apart from method of payment there is no difference between expenditures by TWA and those by Cahill Gordon since all of these expenditures were in the nature of disbursements of counsel and in each instance ultimate payment was made by TWA.

4. All payments by TWA of bills forwarded to it by Cahill Gordon and of bills sent directly to it have of course been recorded in TWA's books of account. There is being submitted herewith an affidavit of Robert L. Cooper, Vice President and Controller of TWA, which sets out all such direct expenditures by TWA in connection with this suit, all of which were necessarily incurred during the course of this litigation.

5. The records of both Cahill Gordon and TWA relating to expenditures in this case have been reviewed at my request and under my supervision. For convenience, I have set out in this affidavit both the expenditures made directly by TWA (as listed in the Cooper affidavit, upon which I rely for the fact of such expenditures) and the

expenditures made initially by Cahill Gordon and billed to TWA as disbursements of counsel (as recorded in Cahill Gordon's accounting records).

6. TWA's total expenditures in this case—including disbursements of Cahill Gordon but not including either legal fees paid and payable to Cahill Gordon or legal fees and disbursements paid to the law firm of Chadbourne, Parke, Whiteside & Wolff—were $2,233,050.58 through November 30, 1969. All of these expenditures have in fact been made by TWA, all were for expenses necessarily incurred in the course of this lawsuit, and TWA seeks to recover that entire amount as part of its cost of suit herein. For convenience, in listing expenditures in this paragraph 6, I have indicated with an asterisk those which were made by Cahill Gordon and billed to TWA as disbursements. Those amounts set out in this paragraph 6 but not marked by an asterisk reflect expenditures made directly by TWA.

A. Transcripts of Hearings, Testimony and Depositions:

TWA made the following expenditures for transcripts of hearings and depositions which were necessarily required for use in this lawsuit:

Commerce Reporting Co. [Transcripts of depositions and other proceedings before Special Master Rankin (including photocopies of exhibits)]	$18,413.29
Commerce Reporting Co. [Transcripts of depositions and other proceedings before Special Master Rankin (including photocopies of exhibits)]	13,635.67*

* Initially paid by Cahill Gordon and then billed to and paid by TWA as a disbursement of counsel.

Exhibit A Annexed to Exhibit B Annexed to Affidavit of Dudley B. Tenney

Commerce Reporting Co. [Transcripts of Damage Hearings before Special Master Brownell]	$29,288.33*
Southern District Court Reporter [Transcripts of Hearings before Judge Metzner]	132.12
Southern District Court Reporter [Transcripts of Hearings before Judge Metzner]	1,892.35*
Hoover Reporting Co., Inc. [Transcript of Supreme Court Argument]	255.00*

B. PRINTING BILLS:

TWA made the following expenditures for printing briefs, appendices, and opinions filed during the course of this lawsuit:

Appeal Printing Co. [50 copies of Memorandum in Support of Motion to Strike or Dismiss Counterclaims 1-5, U.S.D.C. S.D.N.Y., March 29, 1962]	$ 763.64*
Appeal Printing Co. [200 copies of TWA's Memorandum in Support of its Complaint, U.S.D.C. S.D.N.Y., February 2, 1963]	2,662.29
Appeal Printing Co. [125 copies of TWA's Brief in Court of Appeals, No. 28405, September 30, 1963]	2,733.43

* Initially paid by Cahill Gordon and then billed to and paid by TWA as a disbursement of counsel.

Exhibit A Annexed to Exhibit B Annexed to Affidavit of Dudley B. Tenney

Appeal Printing Co. [200 copies of TWA's Brief in Court of Appeals, No. 28406, September 30, 1963]	806.36
Appeal Printing Co. [100 copies of the Appendix for Appellee TWA in Court of Appeals, No. 28406, September 30, 1963]	2,492.78
Appeal Printing Co. [100 copies of TWA's Rejoinder Brief, Court of Appeals, No. 28405, November 12, 1963]	606.63
Record Press [2000 copies of the Court of Appeals Opinion of June 2, 1964]	$ 723.84
Record Press [150 copies of Court of Appeals Opinion of June 2, 1964]	165.88*
Appeal Printing Co. [200 copies of TWA's Brief in Opposition, Supreme Court, No. 443, September 30, 1964]	891.85
Appeal Printing Co. [150 copies of TWA's Brief in Opposition, Supreme Court, No. 501, October 14, 1964]	123.24
Appeal Printing Co. [500 copies of Respondent's Brief, Supreme Court, No. 443, February 18, 1965]	11,270.27

* Initially paid by Cahill Gordon and then billed to and paid by TWA as a disbursement of counsel.

Exhibit A Annexed to Exhibit B Annexed to Affidavit of Dudley B. Tenney

Appeal Printing Co. [150 copies of Respondent's Brief, Supreme Court, No. 501, February 18, 1965]	69.06*
Appeal Printing Co. [200 copies of Memorandum in Response to Reply Brief for Petitioners, Supreme Court, No. 443, March 2, 1965]	251.58
Appeal Printing Co. [300 copies of TWA's Memorandum in Support of Claims for Damages filed with Special Master Brownell on May 31, 1968]	26,708.85
Appeal Printing Co. [200 copies of TWA's Reply Memorandum filed with Special Master Brownell on July 31, 1968]	17,616.90
Record Press [200 copies of Special Master Brownell's Report of September 21, 1968]	3,360.00

C. Reproduction of Documents:

TWA made the following expenditures for the reproduction of documents needed in connection with discovery proceedings, preparation for trial and the damage hearings:

National Reproductions, Inc.	$50,021.12
Reproduction of TWA Documents in connection with Simat's Supplemental Report	6,333.60

* Initially paid by Cahill Gordon and then billed to and paid by TWA as a disbursement of counsel.

Exhibit A Annexed to Exhibit B Annexed to Affidavit of Dudley B. Tenney

Dunnington, Bartholow & Miller [Documents reproduced from files of Dillon, Read & Co., Inc.]	1,648.80
Mercury Reproduction Service	2,383.84
Manhattan Reproduction Service Corp.	378.30
Recordak Corporation [Microfilming and copies of documents produced by Toolco in response to Rule 34 motions]	6,980.16
Recordak Corporation [Microfilming and copies of documents produced by Toolco in response to Rule 34 motions]	13,337.97*
Disbursements of Cahill Gordon for reproduction costs, including multigraphs, photostats and xerox copies (but not including the payments to Recordak Corporation listed above) and bills for documents produced by the defendants, additional defendants, witnesses and others pursuant to subpoena and otherwise	54,832.21*

D. Travel Expenses:

Disbursements of Cahill Gordon for travel expenses during the course of this litigation totaled $47,590.67.* Included in such travel expenses were costs incurred in trips to Kansas City, Los Angeles, Houston and several other cities during the course of documentary discovery

* Initially paid by Cahill Gordon and then billed to and paid by TWA as a disbursement of counsel.

proceedings, travel to Los Angeles in preparation for the scheduled deposition of Hughes, various trips in attempts to serve process upon Hughes, trips to interview witnesses and potential witnesses, and various trips to Washington, including that for the Supreme Court argument. All of such travel expenses, both by lawyers and by clerical personnel, were necessary to the prosecution of this lawsuit.

E. Services of Experts Retained on Behalf of TWA:

TWA paid the following amounts to firms and individuals that Cahill Gordon retained as experts during the course of this litigation. In a case as complex as this, involving as it did numerous technical questions, the services of these firms and individuals were essential to TWA's successful preparation for and prosecution of its lawsuit.

Price Waterhouse & Co.		$496,867.76
Fees	464,600.00	
Disbursements	32,267.76	
Drexel Harriman Ripley, Inc.		258,034.33
Fees	257,250.00	
Disbursements	784.33	
R. Dixon Speas Associates		276,942.26
Fees	234,206.00	
Disbursements	42,736.26	
Coverdale & Colpitts		610,833.36
Fees	569,810.23	
Disbursements	41,023.13	
A. S. Norton [Retained as a financial expert]		5,650.00

Exhibit A Annexed to Exhibit B Annexed to Affidavit of Dudley B. Tenney

Charles A. Appel 484.80*
[Signature Investigation]

Included as part of the disbursements of R. Dixon Speas Associates are the fees paid to Professor Van Court Hare ($11,673.08) and Professor Sebastian Littauer ($6,120.00) who were retained, as experts in mathematics, to assist the Speas organization and TWA's lawyers with problems involving statistical theory and methods that arose in preparing TWA's damage case and during the damage hearings.

F. Services of Law Firms and Others Retained on Behalf of TWA, Chiefly in Connection With Efforts to Serve Howard R. Hughes:

(i) The following firms and individuals were retained on behalf of TWA in connection with its efforts to effect service upon Hughes:

Johnson & Roberts & Bluemle [Lawyers, Phoenix, Arizona]	$ 490.47*
John S. Harley, Inc. [Private Investigators, New Hyde Park, New York]	2,100.95*
Lawrence Kestler, Jr. [Private Investigator, New Hyde Park, New York]	346.80*
Hidalgo & Barrero [Lawyers, Mexico City, Mexico]	679.64*
Investigators, Inc. [Private Investigators, Miami, Florida]	1,875.32*

* Initially paid by Cahill Gordon and then billed to and paid by TWA as a disbursement of counsel.

Exhibit A Annexed to Exhibit B Annexed to Affidavit of Dudley B. Tenney

(ii) TWA paid the Los Angeles law firm, Gibson, Dunn & Crutcher, fees of $14,050.00 and disbursements of $1,090.44 for legal services performed during the course of this litigation. Cahill Gordon also paid to Gibson, Dunn & Crutcher $6,500.00* in legal fees and $18,797.20* in disbursements ($18,635.85* of which disbursements were for services of A. B. Leckie and G. William Coulthard, private investigators, in connection with efforts to serve Hughes).

(iii) TWA paid the Oklahoma City law firm, Crowe, Boxley, Dunlevy, Thweatt, Swinford & Johnson, fees of $125.00 and disbursements of $107.32 for legal services performed during the course of this litigation.

G. Fees and Disbursements of Special Masters:

The following fees and disbursements were paid by TWA, or by Cahill Gordon on its behalf, to Special Master Rankin and Special Master Brownell:

J. Lee Rankin, Special Master	$ 2,055.00*
J. Lee Rankin, Special Master	15,232.50
Herbert Brownell, Special Master	93,321.94

H. Other Expenses:

(i) TWA reimbursed Cahill Gordon for the following additional disbursements by it:

Telephones and Telegrams	$ 7,760.01*
Non-legal Overtime	25,257.78*
Special Clerical Assistance	41,564.48*

* Initially paid by Cahill Gordon and then billed to and paid by TWA as a disbursement of counsel.

Exhibit A Annexed to Exhibit B Annexed to Affidavit of Dudley B. Tenney

Meals and Taxis	25,473.41*
Miscellaneous Expenses	3,822.67*

(ii) TWA itself incurred miscellaneous expenses totaling $5,217.11.

TOTAL	$2,233,050.58

7. In the event that the Court should conclude, contrary to TWA's contention otherwise, that any recovery of TWA's cost of suit must be limited to an award of attorneys' fees and only such additional expenditures as would be taxable as costs in an ordinary lawsuit, the following portions of the expenditures described in paragraph 6 above appear to fall within the definition of taxable costs set out in the applicable statutes and decisions:

Reproduction of Documents [28 U.S.C. § 1920(4)]		$135,916.00
Fees and Disbursements of Special Masters:		110,609.44
J. Lee Rankin	$17,287.50	
Herbert Brownell	93,321.94	
[The fees and disbursements of the Special Masters are taxable costs as provided in this Court's orders of February 7, 1962, May 10, 1962, January 4, 1966, and February 4, 1966.]		
Marshal's Fees and Fees of Process Server [28 U.S.C. § 1920(1)]		139.00

* Initially paid by Cahill Gordon and then billed to and paid by TWA as a disbursement of counsel.

Exhibit A Annexed to Exhibit B Annexed to Affidavit of Dudley B. Tenney

Clerk's Fee for Filing Complaint [28 U.S.C. § 1920(1)]	15.00
Docket Fee [28 U.S.C. § 1923(a)]	20.00
Expenditures by four lawyers for travel to Los Angeles and return and expenses in connection with said travel for the purpose of selecting and establishing an office to be used in connection with the Hughes deposition	3,561.24
[These are taxable costs, pursuant to this Court's order of July 1, 1966 allowing costs to the Equitable Life Assurance Society of the United States and the Metropolitan Life Insurance Company, additional defendants on the counterclaims and pursuant to Fed.R.Civ.P. 37]	
Other Expenditures made in connection with the scheduled Hughes deposition:	1,041.41
[These expenditures made in connection with taking Hughes' deposition are taxable costs as provided in this Court's order of July 11, 1966 allowing costs to the Equitable Life Assurance Society of the United States and the Metropolitan Life Insurance Company, additional defendants on the counterclaims and pursuant to Fed.R.Civ.P. 37]	
Spring Street Realty Co. [Rental of Office Space]	$425.00

Exhibit A Annexed to Exhibit B Annexed to Affidavit of Dudley B. Tenney

A-1 Desk Refinishing Co. [Rental of furniture]	477.88	
John P. Filbert Co., Inc. [Rental of sound system]	96.93	
Office Machines Inc.	41.60	
Services in Connection with Attempts to serve Hughes [28 U.S.C. § 1920(1)]		$ 30,790.38
Printing Bills		71,246.60
Southern District Court Reporter [28 U.S.C. § 1920(2)]		2,024.47
Transcript of depositions and other proceedings before Special Master Rankin [TWA's share of cost of transcript furnished to Special Master Rankin plus 3 copies (see paragraph 8 below)]		22,789.65
Transcript of damage hearings before Special Master Brownell [TWA's share of cost of transcript furnished to Special Master Brownell plus 5 copies (see paragraph 8 below)]		20,890.99
TOTAL		$399,044.18

8. All of TWA's expenditures for copies of transcripts of the proceedings before Special Master Rankin and Special Master Brownell were made because TWA's lawyers had decided that each such copy was required in

the prosecution of this suit. However, if the Court should conclude that TWA can be reimbursed for but a limited number of transcript copies, TWA respectfully submits that it should be permitted to recover, at a minimum, its share of the cost of the copy of the transcripts furnished to the Special Masters, the cost of three copies of the transcript of proceedings before Special Master Rankin, and the cost of five copies of the transcript of proceedings before Special Master Brownell.

A. Because of the complexity of the discovery proceedings herein, the sheer bulk of the transcript recording the exhaustive depositions, and the many legal and factual controversies which occurred during discovery proceedings, TWA's minimum requirements for copies of the transcript of the proceedings before Special Master Rankin were to have one for use at the depositions or other proceedings, a second copy which could be used at Cahill Gordon's offices (all proceedings relating to discovery were conducted in the offices of defendants' counsel), and a third copy which would be available for use by TWA, the witnesses whose depositions were being taken, and the firm of lawyers who represent TWA generally. As is set out in the annexed affidavit of Edward Grant, the cost of one copy of transcript of the depositions and other proceedings before Special Master Rankin (including photocopies of exhibits) plus TWA's share of the cost of the Special Master's original of the transcript was $17,340.73 (TWA's share of the Special Master's copy was $5,275.07); for a second and third copy the cost was $2,724.46 each.

B. In a damage hearing as complex and difficult as that before Special Master Brownell, it was essential for all

participants in the proceedings to have full and ready access to the transcript. This requirement could not have been met by TWA's having fewer than five copies of the transcript (in addition to the Special Master's copy). One copy was needed for use at the hearings by Cahill Gordon. A second copy was needed for use as a Cahill Gordon office copy (and that copy was eventually filed with the Court as the official transcript of the damage hearings after the Special Master decided that he did not wish to file his own working copy). A third copy was needed by TWA, the client, and by the firm of lawyers who represent TWA generally. A fourth was needed for use by Price Waterhouse (which firm had to follow the entire proceedings very closely because the Price Waterhouse Report and the calculations performed by that firm were the means by which the results of the damage hearings were reflected in dollar figures). A fifth copy was needed for use by the other experts who were assisting TWA's counsel in the damage hearing. Because of the interrelation of various parts of TWA's damage case, all of TWA's expert witnesses had to follow the proceedings on a current basis and copies of the transcript were in fact furnished to each of the firms retained as experts. However, in seeking to recover its costs on a minimum need basis, TWA is asking for only one copy for use by all its experts but Price Waterhouse. As is set out in the annexed affidavit of Edward Grant, TWA's share of one half of the total cost of the original transcript furnished to the Special Master was $7,868.44; the cost of the first TWA copy was $5,421.25; the cost of the second TWA copy was $2,717.75;

the cost of the third, fourth and fifth copies was $1,627.85 each.

/s/ MARSHALL H. COX, JR.
MARSHALL H. COX, JR.

(Sworn to December 30, 1969.)

Exhibit C Annexed to Affidavit of Dudley B. Tenney

This exhibit consists of the judgment for costs which appears reproduced heretofore.

Exhibit D Annexed to Affidavit of Dudley B. Tenney

October 5, 1973

Re: TWA v. Howard R. Hughes, et al.
U.S.D.C., S.D.N.Y.
61 Civ. 2324

Dear Sirs:

In connection with the Bill of Costs in the above-entitled matter sworn to and served on us on September 17, 1973, you are hereby requested to furnish to us on or before October 15, 1973 the following documents and information relevant to the sum requested to be taxed under the heading "Costs of Bond":

1. A true copy of the credit agreement or other instrument pursuant to which the letter of credit of Bank of America filed by defendant in lieu of a surety bond was issued, and providing for payment to Bank of America of such sums as are included in the amount requested to be taxed as costs, together with copies of all related instruments and supporting documents.

2. True copies of all other credit agreements or instruments relating to loans made or committed for by Bank of America to defendant Hughes Tool Company or defendant Howard R. Hughes or both of them which loans or credit arrangements were made or in effect at any time during the period between the filing of the Report of Special Master Herbert Brownell on September 21, 1968 and January 10, 1973.

3. True copies of all bills rendered by Haskins & Sells, certified public accountants, to Hughes Tool Company

covering regular or special audits of Hughes Tool Company or any division thereof made during the years 1968 and 1969 or as of any date in said years, or, in lieu of such copies, a detailed statement by Haskins & Sells as to the amounts so billed, specifying the periods or dates and types of audits to which such bills related. To the extent applicable such statement should be broken down in the same categories and give the same information as to each audit as the information provided in the letter of Haskins & Sells, a copy of which was delivered to the Clerk of the Court on October 1, 1973, and the information supplemental thereto requested below.

4. With respect to the said letter of Haskins & Sells, a further statement breaking down by calendar quarters the charges specified in such letter, giving in each case to the extent applicable the date as of which each audit was made and the amount charged in respect thereof.

Very truly yours,

CAHILL GORDON & REINDEL
Attorneys for Plaintiff

By .....

Messrs. Davis & Cox
One State Street Plaza
New York, N.Y. 10004

Att: Maxwell E. Cox, Esq.

DBT:pe Hand Del. 10/5/73

Exhibit E Annexed to Affidavit of Dudley B. Tenney

LAW OFFICES OF
DAVIS & COX
ONE STREET PLAZA
NEW YORK, NEW YORK 10004

(212) 425-0500

October 15, 1973

Dudley B. Tenney, Esq.
Cahill, Gordon & Reindel
80 Pine Street
New York, New York 10005

Re: TWA v. Howard R. Hughes, et al.
U.S.D.C. S.D.N.Y.
61 Civ. 2334

Dear Mr. Tenney:

In response to the four requests recited in your letter of October 5, 1973, this letter will serve to state our position as regards to the information sought.

1. As to your first request for a copy of the credit agreement for, or instrument pursuant to which, the Letter of Credit of the Bank of America was filed by the defendants, it is our position that we will allow you to review, but not copy, our file on this matter. The foregoing arrangement is being offered in order that you might satisfy yourself as to the existence of such an agreement.

2. Your second request is denied as we feel that it is not relevant to the Letter of Credit agreement en-

tered into by defendants with the Bank of America, pursuant to the June 16, 1970 Order of Judge Metzner.

3. As to your third request, we are providing you with a copy of an October 12, 1973 certified letter by Gene Harris, of Haskins & Sells, attesting to the costs of an examination of the Financial Statement of Summa Corporation (formerly Hughes Tool Company) for the years 1967, 1968 and 1969. In addition, we are also providing you with an October 15, 1973 certified letter by Gene Harris, of Haskins & Sells, attesting to the fact that the cost of the 1970, 1971 and 1972 quarterly audits of Summa Corporation was based on the incremental costs of the quarterly balance sheet examination in excess of an estimated cost of the annual examination. The estimated costs for the annual examinations were based on actual fees charged for the annual examinations for each of the three years preceding the commencement of the quarterly examinations.

4. You have previously been provided with a copy of the letter of James L. Williams, of Haskins & Sells, dated March 1, 1973, which details the costs of the TWA quarterly audits for the years 1970, 1971 and 1972.

Very truly yours,

/s/ David S. Dubin
David S. Dubin

DSD:gy

Enclosure

Exhibit F Annexed to Affidavit of Dudley B. Tenney

HASKINS & SELLS
CERTIFIED PUBLIC ACCOUNTANTS
1200 TRAVIS
HOUSTON 77002

June 19, 1973

Summa Corporation
25th Floor, Exxon Building
Houston, Texas 77002

Attention of Mr. W. E. Rankin, Treasurer

Dear Sirs:

During the years 1970, 1971, and 1972 we made examinations of the quarterly balance sheets of Summa Corporation (formerly Hughes Tool Company) pursuant to an order of the United States District Court for the Southern District of New York, dated June 16, 1970. Our charges for these examinations have been billed to and collected from Summa Corporation.

A summary, by years, of all such charges is as follows:

1970

Nevada Division	$156,607
General Office	83,416
Oil Tool Division	6,608
Aircraft Division	35,946
Motion Picture Division	2,123
Subtotal	284,700
Hughes Air Corp.	11,000
Total	295,700

Exhibit F Annexed to Affidavit of Dudley B. Tenney

1971

Nevada Division	$ 98,714
General Office	64,579
Oil Tool Division	14,881
Aircraft Division	32,686
Motion Picture Division	2,179
Subtotal	213,039
Hughes Air Corp.	19,000
Total	232,039

1972

Nevada Division	$ 89,315
General Office	23,068
Oil Tool Division	11,641
Aircraft Division	14,064
Motion Picture Division	1,624
Subtotal	139,712
Hughes Air Corp.	19,500
Total	159,212
TOTAL	$686,951

Very truly yours,

HASKINS & SELLS

By /s/ GENE HARRIS
Gene Harris, Partner

Exhibit F Annexed to Affidavit of Dudley B. Tenney

THE STATE OF TEXAS:
COUNTY OF HARRIS:

Before me, the undersigned authority, on this day personally appeared Gene Harris, known to me to be the person whose name is subscribed to the foregoing letter, and acknowledged to me that he executed the same for the purposes therein expressed in the capacity therein stated.

Given under my hand and seal of office, this the 19th day of June, 1973.

/s/ ADELE BONDESEN
Notary Public

ADELE BONDESEN
Notary Public in and for Harris County, Texas
My Commission Expires June 1, 1975

Exhibit G Annexed to Affidavit of Dudley B. Tenney

HASKINS & SELLS
CERTIFIED PUBLIC ACCOUNTANTS
1200 TRAVIS
HOUSTON, TEXAS 77002

October 12, 1973

Summa Corporation
25th Floor, Exxon Building
Houston, Texas 77002

Attention of Mr. W. E. Rankin, Treasurer

Dear Sirs:

We made an examination of the financial statements of Summa Corporation (formerly Hughes Tool Company) for the years 1967, 1968, and 1969. Our fees for these examinations, which have been billed to and collected from Summa Corporation, were as follows:

1967	$217,900
1968	262,821
1969	307,916

Very truly yours,

HASKINS & SELLS

By /s/ GENE HARRIS
Gene Harris, Partner

Exhibit G Annexed to Affidavit of Dudley B. Tenney

THE STATE OF TEXAS:
COUNTY OF HARRIS:

Before me, the undersigned authority, on this day personally appeared Gene Harris, known to me to be the person whose name is subscribed to the foregoing letter, and acknowledged to me that he executed the same for the purposes therein expressed in the capacity therein stated.

Given under my hand and seal of office, this the 12th day of October, 1973.

VIOLA S. JANDA
Notary Public

VIOLA S. JANDA
Notary Public in and for Harris County, Texas
My Commission Expires June 1, 1975

Exhibit H Annexed to Affidavit of Dudley B. Tenney

HASKINS & SELLS
CERTIFIED PUBLIC ACCOUNTANTS
1200 TRAVIS
HOUSTON, TEXAS 77002

October 15, 1973

Summa Corporation
25th Floor, Exxon Building
Houston, Texas 77002

Attention of Mr. W. E. Rankin, Treasurer

Dear Sirs:

In our letter to you dated June 19, 1973 we furnished you with a summary of the audit fees for our examination of the quarterly balance sheets of Summa Corporation (formerly Hughes Tool Company) for the years 1970, 1971, and 1972. These fees comprise only the incremental cost of the quarterly balance sheet examinations over the estimated cost of an annual examination for each of those years. The estimated cost for the annual examinations were based on actual fees charged for annual examinations for each of the three years preceding the commencement of the quarterly examinations.

Very truly yours,

HASKINS & SELLS

By /s/ GENE HARRIS
Gene Harris, Partner

Exhibit II Annexed to Affidavit of Dudley B. Tenney

THE STATE OF TEXAS:
COUNTY OF HARRIS:

Before me, the undersigned authority, on this day personally appeared Gene Harris, known to me to be the person whose name is subscribed to the foregoing letter, and acknowledged to me that he executed the same for the purposes therein expressed in the capacity therein stated.

Given under my hand and seal of office, this the 15th day of October, 1973.

VIOLA S. JANDA
Notary Public

VIOLA S. JANDA
Notary Public in and for Harris County, Texas
By Commission Expires June 1, 1975

Exhibit I Annexed to Affidavit of Dudley B. Tenney

LAW OFFICES OF
DAVIS & COX
ONE STATE STREET PLAZA
NEW YORK, NEW YORK 10004

(212) 425-0500

October 9, 1973

Re: TWA v. Howard Hughes et al.
Bill of Costs

Marshall Cox, Esq.
Cahill Gordon & Reindel
80 Pine Street
New York, New York 10005

Dear Marshall:

At the request of Max Cox, I am enclosing herewith a copy of Haskins & Sells March 1, 1973 letter with summary of 1970, 1971 and 1972 billings attached thereto.

Very truly yours,

/s/ DAVID S. DUBIN
David S. Dubin

DSD:ls

Enclosure

Exhibit I Annexed to Affidavit of Dudley B. Tenney

RECEIVED
MAR 2 1973
SUMMA CORPORATION
GENERAL OFFICE

HASKINS & SELLS
CERTIFIED PUBLIC ACCOUNTANTS
1200 TRAVIS
HOUSTON 77002

March 1, 1973

Mr. W. E. Rankin
Summa Corporation
25th Floor, Exxon Building
Houston, Texas 77002

Dear Mr. Rankin:

At your request, we are enclosing herewith a summary of our billings rendered in connection with the quarterly TWA audits performed in 1970, 1971, and 1972.

Very truly yours,

HASKINS & SELLS

By /s/ JAMES L. WILLIAMS
James L. Williams

Enclosure

Exhibit I Annexed to Affidavit of Dudley B. Tenney

SUMMA CORPORATION

Summary of Billings From Haskins & Sells For the Three Years Ended December 31, 1972

	For Annual Audit	For TWA Quarterly Audits	Total
1970			
Nevada Division	$199,200	$156,607	$355,807
General Office	50,000	83,416	133,416
Oil Tool Division	42,000	6,608	48,608
Aircraft Division	45,000	35,946	80,946
Motion Picture Division	1,600	2,123	3,723
Sub Total	$337,800	284,700	$622,500
Hughes Air Corp.		11,000	
Total		295,700	
1971			
Nevada Division	$230,000	98,714	$328,714
General Office	45,000	64,579	109,579
Oil Tool Division	40,000	14,881	54,881
Aircraft Division	42,000	32,686	74,686
Motion Picture Division	2,000	2,179	4,179
Sub Total	$359,000	213,039	$572,039
Hughes Air Corp.		19,000	
Total		232,039	
1972			
Nevada Division	$240,000	89,315	$329,315
General Office	50,000	21,000*	71,000
Oil Tool Division	30,000	11,582*	41,582
Aircraft Division	45,000	17,000*	62,000
Motion Picture Division	3,000	2,500*	5,500
Sub Total	$368,000	141,397	$509,397
Hughes Air Corp.		19,500	
Total		160,897	
Total Billings For TWA Quarterly Audits		$688,636	

* Estimates which will be finalized in April 1973.

Exhibit J Annexed to Affidavit of Dudley B. Tenney

(Letterhead of Cahill Gordon & Reindel)

October 19, 1973

Re: Trans World Airlines, Inc.
v. Howard R. Hughes, et al.
61 Civ. 2324 (S.D.N.Y.)

Dear Mr. Dubin:

In connection with the taxation of costs in this matter, by our October 5, 1973 letter we requested certain underlying information from your firm about the claim for "Costs of Bond" which the Clerk has since taxed as a cost against TWA in the amount of $1,768,616.40. That Item consists of two elements: (i) $1,081,665.40 paid to the Bank of America as interest and for certain other charges, and (ii) $686,951 paid to the accounting firm of Haskins & Sells. You responded to my October 5 letter by your letter of October 15. At that time you made available to us for our review (i) what was described as your firm's "file" with respect to the letter of credit of the Bank of America filed by defendants as security for the supersedeas bond in this action, and (ii) copies of two notarized letters, one dated October 12 and the other October 15, from Gene Harris, a partner of Haskins & Sells, to Summa Corporation ("Toolco"). This material does not provide the information needed.

The Letter of Credit

From what you said at the taxation hearing before Mr. Werner A. Koehler, Deputy Clerk of the District Court, on October 16, we understand that Toolco has in its possession certain other documents relating to the letter of credit

which were not included in the file made available to us. This is plainly the case since the file you gave us contains no document either fixing the rates at which, or describing how, the Bank of America was to be paid for issuing the letter of credit. We recognize that you have furnished us invoices from the Bank of America charging Toolco interest at a rate of one-half of one per cent per annum on the $75 million provided under the letter of credit, but we still need to examine whatever agreement or agreements were made about the rate of interest.

Since Toolco also seeks to tax $66,040.40 paid to the Bank of America for a billing from Title Insurance and Trust Company, a County Recorder's charge and an otherwise undescribed Bank of America fee (see Exhibit B-3 to Schedule B to Motion for Allowance of Costs, sworn to August 13, 1973 and served upon us September 14, 1973), we need copies of all documents relevant to this charge. Without all of the documents that constitute the totality of the agreement between the Bank of America and Toolco that resulted in the Bank's issuing the letter of credit that secured the supersedeas bond in this action, the propriety of taxing TWA with the charges made cannot be determined.

It appears that the security interests created in favor of the Bank of America in connection with the credit agreement also constituted security for "[a]ny other obligations of us [Toolco] to you [Bank of America]" (*see* letter of June 22, 1970 from Raymond M. Holliday and C. J. Collier, Jr. of Toolco to Bank of America, paragraph 2.C., Page Two). Your October 15 letter denied our October 5 request for "copies of all other credit agreements or instruments relating to loans made or committed for by Bank of America to defendant Hughes Tool Company or defendant How-

ard R. Hughes or both of them which loans or credit arrangements were made or in effect at any time during the period between the filing of the Report of Special Master Herbert Brownell dated September 21, 1968 and January 10, 1973." In light of the provisions of paragraph 2.C of Toolco's June 22, 1970 letter to the Bank of America, we hereby renew that request and ask further that we promptly be advised whether there were in fact in existence at any time between June 22, 1970 and March 9, 1973 any other obligations of Toolco to the Bank of America.

Auditing Costs

Under the District Court's June 16, 1970 order, we were furnished with audited balance sheets of Toolco as of:

June 30, 1970
September 30, 1970
December 31, 1970
March 31, 1971
June 30, 1971
September 30, 1971
December 31, 1971
March 31, 1972
June 30, 1972
September 30, 1972

In addition to the letter from Gene Harris of Haskins & Sells which you attached as Exhibit B-14 to your Motion for Allowance of Costs and the two letters from Mr. Harris dated October 12 and October 15, you gave us on October 1, 1973 a copy of a March 1, 1973 letter to Toolco from James L. Williams of Haskins & Sells to which was annexed a "Summary of Billings from Haskins & Sells for the Three Years Ended December 31, 1972." That sum-

mary and Mr. Harris's October 12 and 15 letters suggest in general terms how Haskins & Sells has derived the amount of the costs that Toolco seeks to have taxed against TWA but leave the specifics of that process wholly obscured.

Mr. Harris's October 12 letter states that the fees received for his firm's annual examination of Toolco's financial statements for the years 1967, 1968 and 1969 were respectively $217,900, $262,821, and $307,916. Despite the request in paragraph 3 of my October 5 letter, Mr. Harris's October 12 letter fails to break down these charges among the different categories used in the attachment to Mr. Williams's March 1, 1973 letter and in Exhibit B-14. Nor does Mr. Harris furnish true copies of all bills rendered by Haskins & Sells to Toolco for all regular or special audits of Toolco during the years in question. No detailed statement specifying the periods or dates and types of audits to which the bills relate was furnished. Mr. Harris does not expressly state whether his firm collected any additional fees from Toolco for services in 1967, 1968 and 1969, and if so what those fees were or for what services they were paid.

Instead, as we understand Mr. Harris's October 15 letter, Haskins & Sells tells us, without explaining what it has done, that it has somehow estimated how much it would have charged Toolco for auditing services performed in each of the years 1970, 1971 and 1972 if it had not been retained to perform quarterly audits pursuant to the provisions of the Court's June 16, 1970 order, and has subtracted that amount from the total billings actually made to Toolco for services in each of those years. It has done this in such a way as to break out separately its charges for services to the Nevada Division, a category called

General Office, the Oil and Tool Division, the Aircraft Division and the Motion Picture Division. It has also, without any explanation, charged TWA for quarterly audits of Hughes Air Corp. (a 78% owned subsidiary of Hughes Tool Company).

Our problem is that accepting the probity of Haskins & Sells, which we do, still does not permit us to accept without further explanation and detail the correctness of whatever methods of allocation Haskins & Sells has used to reach the result it has announced.

Specifically, we need to know whether any special audits were conducted either of Toolco as a whole or any of its operating divisions in 1970, 1971 or 1972 and, if so, what the cost of each of those special audits was. For example, of the $355,807 Haskins & Sells charged Toolco to audit the Nevada Division in 1970, $156,607 has been allocated to TWA Quarterly Audits. But there were only two quarterly audits for TWA in 1970—one for the quarter ending June 30 and the other for that ending September 30. (The Toolco balance sheet as at December 31, 1970 would have been examined routinely by Haskins & Sell in its regular year-end audit.) Even in this two-quarter year, however, the charge to TWA exceeded by more than $50,000 the Nevada Division charges of $98,714 and $89,315 for 1971 and 1972, respectively — although three quarterly audits were required in each of those years. It seems probable that the exceptionally high figure for 1970 was related to the management change which occurred in that division during 1970, a change which has resulted in serious published charges and countercharges which are still in litigation between Mr. Robert Maheu and Toolco. TWA, of course, is not involved in and should not be charged with accounting expenses resulting from these internal prob-

lems. The pattern with respect to "General Office" is similar, and may be similarly explained. A more detailed statement from Haskins & Sells of their actual services is obviously necessary.

We also think it essential that we be provided with an identification of the specific audit to which each charge made relates, including of course the date as of which each audit was made. For example, a quarterly audit appears to have been made (although perhaps not completed) as of March 31, 1970, but the results were not provided to TWA. Expenses with respect to such an audit (whether or not regarded by Toolco and Haskins & Sells as connected with the TWA litigation) cannot be charged to TWA. Any audit with respect to the public sale of the Oil Tool Division should be separately identified, so that its relationship with the so-called TWA audits can be understood. Charges made to Toolco with respect to audits of Hughes Air Corporation must be furnished for the information in the March 1 letter to be useful.

One thing that is clear from the Haskins & Sells letters is that the information which we need with respect to these auditing charges is in fact available. Unless it is furnished to us we cannot even meaningfully consider the correctness or propriety of the allocations that have been made.

Very truly yours,

/s/ Dudley B. Tenney

David S. Dubin, Esq.
Davis & Cox
1 State Street Plaza
New York, New York 10004

Affidavit of Maxwell E. Cox and Exhibits, Dated 11/9/73, Submitted in Opposition to Motion to Retax Costs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324 (CMM)

[SAME TITLE]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.:*

MAXWELL E. Cox, being duly sworn, deposes and says:

1. I am an attorney and a member of the Bar of this Court, and a member of the firm of Davis & Cox, attorneys for defendants Hughes Tool Company ("Toolco") and Raymond M. Holliday. I am fully familiar with the proceedings heretofore had herein and make this affidavit in opposition to the motion of Trans World Airlines, Inc. ("TWA") to retax costs.

2. On May 23, 1973, this Court entered its order directing the Clerk of this Court to enter a judgment dismissing the complaint with costs. On September 17, 1973, defendants submitted their Verified Bill of Costs in the amount of $2,186,919.24, which amount included $71,521.42 as the costs awarded defendants by the Court of Appeals.

3. Defendants' Bill of Costs was reviewed on October 1, 1973, by Mr. Werner A. Koehler, Deputy Clerk of this Court. At the suggestion of the Clerk, a final determination as to the costs to be awarded was postponed until October 16, 1973 in order that counsel for plaintiff and defendants

could meet to determine the propriety of certain items contained within defendants' Bill of Costs. On October 15, 1973, counsel for plaintiff and defendants met and agreed upon the propriety of the costs, relating to depositions, printing and transcripts. On October 16, 1973, the Clerk taxed costs in the amount of $1,941,639.15 against TWA. Of the foregoing amount $1,768,616.40 was awarded as the cost of the bond. The remaining $173,022.75 was awarded as the costs attributable to the fees and disbursements of the Special Masters, printing, depositions and transcripts of the court reporters.

4. As set forth in the accompanying memorandum of law it is Toolco's position that the costs awarded by the Clerk were proper. TWA has taken the position that no costs should have been awarded the defendants except for a reasonable premium relating to Toolco's posting with this Court of a Letter of Credit in the amount of $75 million. With respect to the $1,768,616.40 taxed by the Clerk for defendants' "cost of bond", the sum of $1,081,-665.40 was attributable to interest and fees charged by the Bank of America National Trust and Savings Association ("Bank of America") to Toolco for the issuance of its Letter of Credit in the amount of $75 million. As to the reasonableness of the interest and fees charged Toolco, the affidavit and letter of Mr. John D. Cawley, Vice President of the Bank of America, are attached hereto as Exhibits "A" and "B", respectively.

5. As part of the cost of bond, defendants sought and were awarded the sum of $686,951.00 as the costs of the quarterly audits of Toolco which were ordered by this Court on June 16, 1970. Defendants have previously es-

tablished to the satisfaction of the Clerk that the costs of the quarterly audits were an integral part of the entire cost of the bond. Haskins & Sells, which conducted the quarterly audits, has reviewed the charges incurred by Toolco in connection with such audits. A copy of a letter, dated October 29, 1973, setting forth the results of Haskins & Sells' review is annexed hereto as Exhibit "C". In connection with such review Haskins & Sells has determined that it inappropriately allocated $69,186.00 to its quarterly audits. Accordingly, the amount recoverable by defendants for auditing costs should be reduced to the sum of $617,765.00.

6. In addition to awarding the defendants the cost of the bond, the Clerk awarded the defendants the cost of depositions, transcripts, printing and the fees and disbursements of the Special Masters in the sum of $173,022.75. TWA has taken the untenable position that none of the foregoing costs should be allowed defendants. For the reasons set forth in the accompanying memorandum of law, the actions of the Clerk in awarding these costs were proper.

7. Therefore, it is respectfully submitted that the Court should modify the Clerk's order to reflect the aforesaid sum of $69,186 that should not have been allocated to the costs of the quarterly audits, making the total costs re-

ceivable $1,872,453.15, and in all other respects deny TWA's motion.

/s/ MAXWELL E. COX
Maxwell E. Cox

(Sworn to November 9, 1973.)

Exhibit A Annexed to Affidavit of Maxwell E. Cox

AFFIDAVIT

October 18, 1973

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

John D. Cawley, being duly sworn, disposes [*sic*] and says:

(1) I am Vice President of the Bank of America National Trust and Savings Association, hereinafter referred to as Bank, with offices at 555 South Flower Street, Los Angeles, California 90071. Prior to my present position I held the title of Assistant Vice President of the Bank. In my capacity as Assistant Vice President, I was personally involved in the negotiations between the Bank and Hughes Tool Company (now known as Summa Corporation), hereinafter referred to as Hughes, culminating in the Bank's issuance of its letter of credit described below.

(2) On June 22, 1970 Hughes entered into an agreement with the Bank where the Bank issued a letter of credit to Trans World Airlines, Inc., in the amount of $75 million. The letter of credit served as security for payment of a judgement awarded by the United States District Court for the Southern District of New York on April 14, 1970 in the matter of Trans World Airlines, Inc., vs Howard R. Hughes, Hughes Tool Company and Raymond M. Holliday, 61 Civ. 2324, in favor of Trans World Airlines, Inc., and against defendants Hughes Tool Company and Raymond M. Holliday. It is my understanding that the Court entered an order approving the letter of credit as an acceptable form of security to be furnished to Trans World Airlines, Inc., for payment of the judgement indicated above.

Exhibit A Annexed to Affidavit of Maxwell E. Cox

(3) The Bank charged and received from Hughes a fee of ½ of 1% per annum on the $75 million letter of credit for the period June 22, 1970 through March 7, 1973 when the Bank was notified that the letter of credit was declared null and void by all parties. The fee charged was exclusively and solely for the issuance of the indicated letter of credit and for no other purpose.

(4) A condition precedent to the issuance of the letter of credit was that it be secured by Hughes. A part of the security was the proceeds from a real estate loan granted against a recorded deed of trust on properties owned by Hughes, principally located in Culver City, California. In conjunction with the preparation and documentation of that real estate loan, Hughes paid the Bank a fee of $12,500 and, in addition, paid $53,488.80 which was in turn remitted to the Title Insurance and Trust Company to pay the billing for its issuance of a title policy, plus $51.60 to the Los Angeles County Recorder for the recordation of the indicated deed of trust.

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION

/s/ JOHN D. CAWLEY
John D. Cawley, Vice President

Exhibit A Annexed to Affidavit of Maxwell E. Cox

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES, *ss.*

On October 18, 1973 before me, the undersigned, a Notary Public in and for said State, personally appeared John D. Cawley, Vice President, Bank of America N.T.&S.A., known to me to be the person X whose name X subscribed to the within instrument and acknowledged that he executed the same.

WITNESS my hand and official seal.
Signature ROSE JUDY DE LIEMA
ROSE JUDY DE LIEMA

OFFICIAL SEAL
ROSE JUDY DE LIEMA
NOTARY PUBLIC CALIFORNIA
LOS ANGELES COUNTY
My Commission Expires Jan. 20, 1975

Exhibit B Annexed to Affidavit of Maxwell E. Cox

[EMBLEM] BANK OF AMERICA

NATIONAL DIVISION

JOHN D. CAWLEY
Vice President

October 26, 1973

Mr. David Dubin, Esq.
Davis and Cox Attorneys
One State Street Plaza—30th Floor
New York, New York 10004

Dear Mr. Dubin:

At your request I forwarded an affidavit to you dated October 18, 1973. That affidavit concerned the issuance by the Bank of America of a $75 million Letter of Credit in favor of TWA, which letter of credit was issued at the request of the then Hughes Tool Company.

You have stated that it has been indicated to you that the fee charged appears excessive. While I do not believe it necessary to justify our charges, the fee was and is considered proper if the circumstances surrounding the issuance of that letter of credit are considered, as well as the unique purpose for which it was issued, no less than its size and the period of time for which it was to be outstanding. While not identical, for rough comparison purposes that letter of credit is substantially similar to standby letters of credit, commonly issued by banks, on which fees normally start at ½ of 1%. As well, a rough comparison could be made to a situation where a bank is requested and does commit itself to hold credit available over a period of

time, for which commitment a fee is charged, which normally is ½ of 1%.

In another context, the use of a letter of credit was probably the least expensive format for satisfying the Court Order. I make no pretense of being knowledgeable in the surety field, but I can't help believe that if the normal surety bond had been issued that the fee would have been substantially higher. Also, my understanding is that surety bond fees are payable in advance for specified periods and termination of the need for such a bond prior to its maturity does not necessarily create a pro rata refund of the fee paid. The fee on the letter of credit was paid quarterly and, at termination, the fee was prorated.

I hope this is of some assistance to you in satisfying comments made on this subject. I did not believe that an affidavit was the appropriate format for this response and, therefore, I have drafted this letter.

Very truly yours,

/s/ J. D. Cawley
John D. Cawley
Vice President
cc: Mr. Wm. E. Rankin, Treasurer

Exhibit C Annexed to Affidavit of Maxwell E. Cox

CERTIFIED PUBLIC ACCOUNTANTS
HASKIN & SELLS

HOUSTON, TEXAS 77002
1200 TRAVIS
October 29, 1973

Cahill Gordon & Reindel
Eighty Pine Street
New York, New York 10005

Attention of Mr. Dudley B. Tenney

Dear Sirs:

We have been asked by David S. Dubin, Esquire, of Davis & Cox to reply to your letter dated October 19, 1973 addressed to him. This letter will serve to answer those questions raised within the aforesaid letter.

On page 3 of your letter, you requested a breakdown of our fees for 1967, 1968, and 1969 among the various divisions. The following table presents such information, and includes audit fees billed to and paid by Summa Corporation for the six years ended December 31, 1972 (in thousands):

	1967	*1968*	*1969*	*1970*	*1971*	*1972*
Nevada Division	$ 85	$140	$174	$199	$230	$240
General Office	58	38	51	50	45	50
Oil Tool Division	41	47	42	42	40	30
Aircraft Division	32	35	39	45	42	45
Motion Picture Division	2	2	2	2	2	3
Fees billed as normal cost	218	262	308	338	359	368
Fees billed as excess cost				285	213	140
Total billed	$218	$262	$308	$623	$572	$508

Exhibit C Annexed to Affidavit of Maxwell E. Cox

The above amounts billed as excess cost are exclusive of $11,000, $19,000, and $19,500, respectively for the years 1970, 1971, and 1972 applicable to audit work performed on Hughes Air Corp., a significant subsidiary of Summa Corporation. Such amounts have been excluded from the tabulation only for the purposes of comparison as explained in a subsequent paragraph.

In addition to the services reflected by the fees in the above tabulation, we performed various special services from time to time as requested by Summa Corporation. However, the time spent in connection with these special services, including the time spent in connection with the sale of the Oil Tool Division of Summa Corporation, were accounted for and billed separately; therefore the above amounts do not include fees for special services, except as noted in the following paragraph.

Included in the fees billed as excess costs in the above tabulation for the year 1970 is $69,186 applicable to special services involving the Nevada Division which was incorrectly included by us in the amount billed as excess cost in our previous letters to Summa Corporation. Accordingly, the total of $686,951 included in Mr. Harris' letter dated June 19, 1973 should be revised to $617,765. Because of this oversight we have again reviewed the services performed for Summa Corporation during the years 1970, 1971, and 1972 and satisfied ourselves that no other fees for special services were included in fees billed as excess cost in the above tabulation.

On page 4 of your letter, you requested further explanation and detail of the methods used to allocate our fees between normal annual audits and quarterly audits.

Exhibit C Annexed to Affidavit of Maxwell E. Cox

The problem of such an allocation was not simple, since some of the procedures performed in connection with the quarterly audits could be considered to benefit the annual audits; other procedures had no such benefit. One basis, which we consider reasonable, was to project amounts which normal audits of the respective divisions would cost and to consider fees in excess of these amounts to have been occasioned by the quarterly audits. The projected cost of a normal annual audit for 1970 was determined by reference to such fees for 1967, 1968, and 1969, considering all known changes in circumstances in 1970, including annual revision of our accrual rates used in determination of our fees. This process was also used for revisions of normal auditing costs in 1971 and 1972. This method of allocation was used for all divisions for 1970, and for all divisions except Nevada for 1971 and 1972.

The method used for the Nevada Division in 1971 and 1972 involved an allocation of time by the men performing the audit work between the time spent on work benefitting the annual, as well as the quarterly, audit and the time spent on work benefitting only the quarterly audits. Such allocations were based on specific guidelines determined by our management as to which of our procedures benefitted the annual audits. The change in method in Nevada was made for internal purposes, and did not have a significant effect on the allocation of fees between the annual audit and quarterly audits.

We know of no other methods, other than the two described above, which would result in a reasonable allocation of fees between the annual audit and quarterly audits, and we believe the use of either of these methods, or the combination of the two, resulted in a fair allocation of such costs.

Exhibit C Annexed to Affidavit of Maxwell E. Cox

On page 4 of your letter you request an explanation of why TWA was charged for quarterly audits of Hughes Air Corp. Pursuant to the Court order of June 16, 1970, which required quarterly audits of Hughes Tool Company and Subsidiaries, it was necessary under generally accepted auditing standards to perform sufficient audit work on the financial statements of Hughes Air Corp. in order for us to express an opinion on Summa Corporation's balance sheet, since the investment in Hughes Air Corp. was material in relation to the financial position of Summa Corporation. The fees applicable to Hughes Air Corp. relate solely to quarterly audit work performed in connection with the investment in that subsidiary and were billed to and collected from Summa Corporation; however, normal costs for the annual audit were billed to and collected from Hughes Air Corp. Such normal costs and quarterly audit costs are therefore not included in the above tabulation for the purposes of comparison.

On page 4 of your letter, you have raised questions as to the cost related to the audits of the Nevada Division for 1970.

Because of the sudden increase in our workload due to the quarterly audit requirement imposed by the June 16, 1970 Court order, the initial quarterly examination at June 30, 1970 of the Nevada Division, had to be performed by our Las Vegas office using personnel from several of our other offices. By the time work on the September 30, 1970 audit was begun, the permanent staff of our Las Vegas office had been increased and was sufficient to perform almost all audit work required without the use of borrowed personnel.

An additional reason for the higher cost of the 1970 audits as compared to the 1971 and 1972 audits was that a

complete balance sheet audit of the Nevada Division was necessary at June 30, 1970 as a six-month period had elapsed since our last previous audit. At subsequent quarter-ends, our audit procedures were limited in some areas because a shorter period of time had elapsed since the previous audit.

We believe the foregoing fully answers all of the inquiries contained in your October 19, 1973 letter.

The contents of the foregoing letter are true and correct to the best of our knowledge and belief.

Yours truly,

HASKIN & SELLS

By /s/ GENE HARRIS
Gene Harris, Partner

By /s/ H.K. Robertson
H. K. Robertson, Partner

THE STATE OF TEXAS:
COUNTY OF HARRIS:

Before me, the undersigned authority, on this day personally appeared Gene Harris, known to me to be the person whose name is subscribed to the foregoing letter, and acknowledged to me that he executed the same for the purposes therein expressed in the capacity therein stated.

Given under my hand and seal of office, this the 29th day of October, 1973.

/s/ ADELE BONDESEN
Notary Public

ADELE BONDESEN
Notary Public in and for Harris County, Texas
My Commission Expires June 1, 1975

Exhibit C Annexed to Affidavit of Maxwell E. Cox

THE STATE OF TEXAS:
COUNTY OF HARRIS:

Before me, the undersigned authority, on this day personally appeared H. K. Robertson, known to me to be the person whose name is subscribed to the foregoing letter, and acknowledged to me that he executed the same for the purposes therein expressed in the capacity therein stated.

Given under my hand and seal of office, this the 29th day of October, 1973.

/s/ ADELE BONDESEN
Notary Public

ADELE BONDESEN
Notary Public in and for Harris County, Texas
My Commission Expires June 1, 1975

Plaintiff's Summary of Costs Submitted to Judge Metzner at Hearing of November 15, 1973

A. Total costs taxed against TWA	$1,872,453.15*
B. Cost of Bond	$1,699,430.40
1. Interest at ½ of 1% per annum	$1,015,625.00
2. Deed of Trust	$66,040.40
(a) Bank of America fee	$12,500.00
(b) Title Ins. & Trust Co. fee	$53,488.80
(c) County Clerk Recorder's fee	$51.60
3. Quarterly Audits	$617,765.00**
C. Costs at District Court Level	$173,022.75
1. Pre-Default***	$36,074.29
2. Post-Default	$136,948.46
D. Set-off for Costs re:	
Hughes's Deposition	$4,602.65

* Amount actually taxed by Clerk was $1,941,639.15. Tooleo now concedes in opposing TWA's motion to retax that $69,186 was improperly charged against TWA for quarterly audits. The figure given reflects subtraction of the $69,186 from the total amount taxed against TWA by the Clerk.

** Amount actually taxed less $69,186.

*** This breakdown is the same whether we take as the cut-off date February 7, 1962 (decision on motion to dismiss), May 28, 1962 (entry of judgment on counterclaims) or March 8, 1965 (dismissal of certiorari on counterclaims).

Transcript of Proceedings, November 15, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 CIVIL 2324

[SAME TITLE]

Before:

CHARLES M. METZNER,

District Judge.

New York, N. Y.
November 15, 1973
4.00 P.M.

Appearances:

CAHILL GORDON & REINDEL, Esqs.,
Attorneys for Plaintiff
By: Dudley B. Tenney, Esq.,
Marshall Cox, Esq., and
Michael P. Tierney, Esq., of Counsel

DAVIS & COX, Esqs.,
Attorneys for Defendant
By: Maxwell E. Cox, Esq. and
David S. Dubin, Esq., of Counsel

[2] The Court: This is Mr. Tenney's motion?

Mr. Tenney: Yes, sir, it is.

The Court: You may proceed.

Mr. Tenney: I think, your Honor, that barring something unforeseen, this will be the last time that this group

will be before you on this case. We really have made a major effort, your Honor, to get this thing into a position where there aren't any matters of detail that we need to bother you with, and I hope we have succeeded.

A number of that kind of matters were resolved by agreement. Some were resolved by the Clerk. The principal arguments I put forward on behalf of TWA, however, the Clerk pointed out, and I had to agree with him, were arguments addressed to the discretion of the Court and beyond his competence. But the specific computational things, I think with one small exception that I can come to later, it is only a possible exception, have been resolved and we won't have to bother your Honor with details.

I have here, I have made up, a single sheet summary of where the matter stands, your Honor. I will hand it up. I have given copies to the defendants. As this sheet shows, the cost by the Clerk is the top figure, 1.872 million, of which by far the largest part is classified by the defendants as part of the cost of bond, 1.699 million.

[3] From the beginning of this question of costs we have conceded, your Honor, that the defendants were entitled to the reasonable costs, on an ordinary basis, of the kind of bond that would be issued to secure a stay. We have not contested that they have the right to a proper amount in that regard.

The problem really arises because we did not go, as your Honor well knows, through the ordinary procedure here, perhaps it could not have been done, and defendants have sought to recover for a number of expenses that we regard as inappropriate.

I will go down these different items quickly and give you our general position on them and then come back.

Under the cost of bond, on the first item of interest, one half of one per cent per annum, we concede that they are entitled to a very large part, if not all of that. This is interest charged by the Bank of America, and we have a question as to amount, which I will come to a little later, but by and large there are no real disputes about that.

The Court: What is the basis of such a charge? Did they put the money aside or was it subject to call?

Mr. Tenney: This is what I would call a commitment fee, a commitment fee charged by the Bank of America, [4] for the $75 million that they wrote the letter of credit for for this bond. They charged the defendants one half of one per cent, what they call interest; since the money was not actually lent, I would call it a commitment fee. But that's a matter of detail. It's like the premium; it's in the nature of a premium.

The Court: What is your position on the 1,015,000 or would you rather do it another way?

Mr. Tenney: I will come back to that, if I may.

The Court: Fair enough.

Mr. Tenney: On the second item, the charges for the deed of trust, these are three different matters, costs involved in providing some security to the Bank of A· ·rica, and for some reasons that I will go into in a n. ment we think that all of those should be disallowed as a matter of principle.

The quarterly audits, which is this very large figure of 617,000, we think also that should be disallowed.

Under (c), these are the more or less typical statutory costs, costs of special master's fees, transcripts, and so on, of 173,000. We have no dispute as to the details of these amounts. Those are agreed to.

The problem is, and this is a question addressed, [5] as the Clerk put it, to your discretion, our position is, that since two very large conflicting claims were made here, a claim on our part against Hughes Tool Company and an even larger claim, set of counterclaims, against TWA and others, that the fact that TWA, like the additional defendants, was the winning party on the counterclaims should be taken into account, and we believe that the precedents, particularly precedents in this circuit, indicate that it would be a proper exercise of your Honor's discretion to let the costs of that kind lie where they fall without an allowance to either party of the costs.

The Court: I think I have written that way once, have I not?

Mr. Tenney: I haven't found your Honor's opinion on that. I wish I had.

The Court: I have a recollection that I did that. Go ahead.

Mr. Tenney: We found a couple of Second Circuit opinions.

This last, rather small item of four thousand-six is a very small part of the costs that we were allowed when we thought that we were the victors in this matter, specific costs not normally taxable but that were specific charges with respect to the aborted Hughes deposition of February 11, [6] 1963 that your Honor thought should be taxed because of the special circumstances there involved.

To go back over these items one at a time, on the biggest single item, the 1,015,000, as your Honor may recall, I had been advised by people that I thought were knowledgeable in the matter of surety bonds that the writing of a surety bond for a large corporation in a large sum of money, comparable to this, would, if it could be

arranged, be done at a premium by a bonding company or a consortium of bonding companies that would charge $375,000 a year for it, that is, one quarter of one percent rather than one half of one per cent.

Unfortunately we were unable at the time really to establish whether this would have been practicable, and the defendants never seriously pursued the possibility, as your Honor commented in his opinion.

We were finally furnished, just last Friday, as part of the defendant's reply papers, with an affidavit by the Bank of America and an accompanying letter that did, to our satisfaction, establish that this sum of money, this one half of one per cent, was in fact charged by Bank of America to Hughes Tool Company, and for this purpose, not for any other purpose.

We are also prepared to concede that from the [7] Bank of America's standpoint this was a reasonable charge. As a result, certainly a large part, if not all, of this the defendants are entitled to recover.

TWA can only suggest that, in the light of this history that surrounded this question, something less than the full 1,015,000 might be allowed. But I have no objection to the propriety of the charge from the Bank of America's standpoint or as to the fact that it was in fact charged and paid for this particular letter of credit. So there is not very much contest on that one, except if your Honor thinks—

The Court: I am worried about the 66 thousand dollar figure.

Mr. Tenney: This represents things like recording fees for real estate, for placing loans on certain properties. This was the secured letter of credit. On this we have several points which I think are controlling.

First of all, in general, this kind of charge of establishing that the borrower is in a position where the lender is willing to lend money, that is, the creation of mortgages and so forth, is normally a charge paid directly by the borrower. In this instance it apparently was paid initially by Bank of America and charged back to the borrower.

[8] It seems to me more like lawyers' fees, the kind of thing that a borrower has to do and shouldn't be part of the cost of the letter of credit.

Perhaps more important, the defendants gave us a copy and allowed us to make an extra copy that we can hand up—

The Court: Let me understand. If a bond were posted where the surety company would charge you X per cent but required that you post real estate as security, you would have to pay the cost of doing that?

Mr. Tenney: Yes, your Honor.

The Court: They say—

Mr. Tenney: They say that's a proper addition to the charge. My understanding is normally it is not—

The Court: If you had a bond posted, let's assume it was a hundred thousand dollar bond, and you could get a surety company to have written it, and then they won the appeal, I think they could only get back from you the cost of the surety company.

Mr. Tenney: That is my general understanding, your Honor.

The Court: Not the cost of putting up the property with the surety company to secure it. Do you have [9] anything on that, Mr. Cox?

Mr. Cox: No. We did cite in our memorandum one case in which there were arrangements made, not the usual bonding arrangement, and the Court, it was a Ninth Circuit

case, held that the expenses incurred in arranging bank loans to put up the money were properly chargeable as costs.

The Court: That's a half of one per cent.

Mr. Cox: The actual expenses of arranging the loan.

The Court: This was done to satisfy you, really, not to satisfy the Court.

Mr. Cox: This was done to satisfy the Bank of America.

The Court: Also to let you get off the hook of putting up 110 per cent.

Mr. Cox: Which we couldn't have done.

The Court: Go ahead, Mr. Tenney.

Mr. Tenney: On the case they cite, in that case there was a full hearing and it was found that the total expenses involved were less than the premium that would have otherwise been payable, so this is a different set up. This paper is a somewhat different point, your Honor. What I have just handed up to you is a letter agreement dated June 22, 1970 [10] between Hughes Tool Company and Bank of America which sets up the security arrangements, and on this the specific point that I wish to call your Honor's attention to is on the second page, where it is stated what the security arrangements are to secure.

Your Honor will see that they secure A, B and C. A and B are matters dealing with this letter of credit. C is "any other obligations of us"—that is, Hughes Tool Company—"to you."

It is publicly known, we happen to know and defendants certainly wouldn't deny, that Bank of America is the lead bank for Hughes Tool Company and have been for many, many years. They have had extensive other borrowings. In addition to that it is known that they have, at least on

occasion, loaned very substantial sums of money, that bank has, to Mr. Hughes personally.

It is our understanding that the arrangements that the Bank of America has imposed on that have succeeded in having something, some kind of a relationship between the Hughes Tool Company's obligations and Hughes' obligations, which we were never able to get here.

But the point is that by its face these securities, this security that was put up, by the face of this agreement, operated as a security for all obligations of [11] Hughes Tool Company and not just this letter of credit. We asked on at least two occasions in writing, and once orally at least, for detailed information as to what other obligations there were during this period and immediately prior to this period between the Bank of America and Hughes Tool Company, and Mr. Hughes' obligations might have some relationship to it. We were given no such information.

Even without the information, it is clear that there were substantial other obligations secured by this. This is a rearrangement of the general corporate financial structure. I just don't think that that is properly a charge here. That is the $66,000 figure. It applies to all three of those matters.

The Court: Now the quarterly audits.

Mr. Tenney: The quarterly audits. I think that that is even farther removed, your Honor. I think your Honor will remember, during this period of time which lasted almost three months while there were constant hearings, almost, going on before you as to what arrangements should be made to procure a stay, that our principal concern, the principal concern that I addressed to your Honor, was the problem that TWA felt it faced that the 100 per cent stockholder of Hughes Tool Company might, through his control of Hughes Tool Company, and since he was not within the

jurisdiction [12] of this Court, remove from Hughes Tool Company in one way or another the assets that would otherwise stand behind Hughes Tool Company and its obligation to pay the judgment.

I said to your Honor at the very beginning of these things, of these questions, while we were trying to explore whether we could get a lien on some of these properties, getting a list of properties to see whether liens could be imposed, I said to your Honor that "the entire lien picture could be obviated if we had what I believe TWA had, what I believe most lenders would expect from a company owned by a single stockholder, if we had a kind of guarantee by that stockholder."

If that had been available, if they had been willing to do that, it could have been worked out. There might have been some difficulties. It wouldn't necessarily have involved subjecting him to the general jurisdiction of the Court. But they were not willing to go into that, as your Honor will remember.

I think your Honor will also remember that I argued to the bitter end, without success, for two clauses in the order that were directed to the same matter: one, an order limiting dividends, and I asked for suggestions from the defendants as to amount, any reasonable amount [13] needed for the stockholders' maintenance, needed to pay taxes, just so that there would be a limitation that would prevent removal of large quantities of the necessary assets in the form of dividends.

I asked also, or, without that, I asked at least—and I wanted them both—for an order prohibiting Hughes Tool Company from transferring any substantial assets for less than fair value. What I had in mind there, of course, was the possibility of gifts, say, for example, to Howard

Hughes' Medical Institute, a charitable organization of which Mr. Hughes is the sole trustee. We wanted an order of that kind.

Those orders were bitterly contested. Defendants were not prepared to accept it. It was because we were not able to get any kind of effective assurance that the assets of Hughes Tool Company would not vanish before our eyes that we had to accept what was a very poor second best, the suggestion of the defendants that they give us these certified quarterly audits by Haskins & Sells, for which they are now charging us over $600,000.

Your Honor, it would not have cost them a nickel—maybe I am exaggerating; maybe it would have cost them a few dollars—to work out an arrangement by which we had a guarantee from Mr. Hughes. I think your Honor will recall [14] enough of the history of the case to recognize why we did feel some concern. When they make this arrangement, they volunteer it, they volunteer it in lieu of things that were from the ordinary defendant's standpoint quite simple, I believe, and cost free.

I don't see that they are entitled to recover that on the ground that it is part of the normal charge for securing a superseding bond. I really don't have any more to say on that. It just seems to me on principle, your Honor, not to belong there.

I said a moment ago that there is perhaps one respect in which the details have not fully been agreed. I don't believe any charges for auditing fees should be allowed. If your Honor feels that auditing fees are properly chargeable here, then I do not believe that the record is sufficient for us to accept this amount.

The Court: It looks a little high, doesn't it?

Mr. Tenney: It seemed a little high to us. We have had a number of letters from Haskins & Sells giving us sort of

piece by piece—it is a little hard to get it out—some of the details as to how they did it. It is based on an estimate of what they would have charged Hughes Tool Company if we had not been around, and then they subtract from that the amounts actually charged to Hughes Tool Company [15] and charge us with the difference.

The last thing I want to do is to impugn the honesty of Haskins & Sells in this. But, on the other hand, this kind of subjective allocation is not the easiest thing for us to accept, you see. With the best will in the world, he may not have the same idea.

The Court: Let's go on to C, costs at district court level. Do you have any problems there? That's the counterclaim problem.

Mr. Tenney: Yes, that's the counterclaim problem.

The Court: D is the—

Mr. Tenney: D is the small charge that was allowed with respect to our special preparations. There is no lawyers' time in that, for example. I have forgotten the exact details, but it was worked out at the time of your Honor's order in 1970. It involved moving a few files, one file clerk, I believe, that sort of thing. The amount is not big, but it is a question of principle for us. We think that should be a setoff against whatever is allowed here.

This was a sanction with respect to a failure to even advise any of the parties as to what was intended at the time of the default. It was on that ground that this [16] type of charge was evolved.

The Court: I remember.

Let me hear from Mr. Cox. That's all?

Mr. Tenney: That's it, your Honor.

Mr. Cox: Your Honor, as I understand it, there is no real dispute about the interest—

The Court: I gather we are concerned only with B-2 and B-3.

Mr. Cox: On B-2, the fact is that this security interest was created solely in connection with the letter of credit. Mr. Cawley of the Bank of America has so stated. The only reason that there was a provision in it that it would secure all other indebtedness is that the banks always put provisions in their agreements that if they have security for something, it will secure all other indebtedness.

The fact is that there was no other indebtedness between the Hughes Tool Company and the Bank of America. These were expenses that were required by the Bank of America in order to accept the security. We asked for other expenses, like lawyers' fees and various other items. They were disallowed. We are not appealing for that. But it seems to me that this is in a different category. Without this we could not have posted the security.

As for the quarterly audits, I suppose, in view of [17] what Mr. Tenney has said, it is necessary to go back into history a little bit. The first time that this matter of a bond was before this Court, on May 11, 1970, there was a discussion about various means of securing the obligation, what TWA would require, and Mr. Tenney said in the transcript, page 13:

> "Mr. Tenney: If a bank or some other lending institution were to lend money, furnish credit, did other things that involved the kind of thing that the defendant is asking the plaintiff here, for a substantial amount of money, that lending institutions would expect and would get certain things. It would get detailed financial statements, certified detailed financial statements, certified at least annually by an outside

auditing firm, at least quarterly by the responsible financial authorities of the defendants."

That was the genesis of the Haskins & Sells quarterly audit. On May 19th Mr. Davis wrote to Mr. Tenney and offered to furnish quarterly audits certified by Haskins & Sells. Mr. Hayes reiterated that offer before the Court on May 20, 1970, and on the same day—excuse me, he thereafter said that, yes, he was going to insist on quarterly. "We do need continuing information as to the defendant's [18] financial position." That was on June 3rd.

It may be that as Mr. Tenney suggested that if Mr. Hughes did this or that, and as I remember what he suggested, he should also pledge all his Hughes Tool Company stock, something else might have happened. But, as the Court rightly remarked, Mr. Hughes was not in this case and it was not Mr. Hughes that was required to post security, it was the Hughes Tool Company.

Though there are some that do not believe it, whether Mr. Hughes controls the Hughes Tool Company, the Hughes Tool Company does not control Mr. Hughes. In any event, the Haskins & Sells reports were required by the order of this Court, and the expenses in the amount of $617,000 seem high. However, Haskins & Sells made an exhaustive study of these matters.

Basically what they did with respect to all except Nevada was to say: All right. The usual annual audit charges have been so much. Our charges have gone up. So in a given year they would have come to this figure. Those charges, we are not going to charge TWA any of that amount, whether or not the actual bill came to that amount, because that would have been a fair charge for the annual audit. The excess was for the quarterly audits allotted to it.

In Nevada, the people that actually did the work [19] made an allocation. Like all allocations, it takes a certain expertise. This is what they came up with. I think it is as good a job as could possibly be done.

The Court: How many quarterly reports were involved?

Mr. Tenney: Ten including two regular annual audits.

Mr. Cox: I believe ten. Seeing this was something to be done by the Court's order, it seemed to us to be a necessary cost incurred by Hughes Tool Company in order to obtain a stay.

As to the costs at the district court level, in the first place the great majority of those costs were incurred after the additional defendants were out of the case related to matters before Mr. Brownell, and all those expenses obviously had nothing to do with the counterclaims.

The Court: That's the $136,000?

Mr. Cox: That's the $136,000.

As to the expenses prior to that, including the fees paid to Mr. Rankin, it is quite true there were counterclaims in this case. It is also true that they were never actually litigated, as your Honor will recall.

Basically, as far as TWA was concerned, as they frequently remarked to this Court, it was a matter not of our collecting money from them but of whether the additional defendants owed Hughes Tool Company money and owed TWA money. [20] I don't think it is comparable to cases where there is a counterclaim.

Where there is a counterclaim, the matter is tried and there is a Mexican standoff, where the Court as a matter of discretion may say, "Well, each party will bear its own costs." I would remind the Court that in its order dismissing the complaint, it said it was to be dismissed with

costs.

As to the $4,000 for the expenses of Mr. Hughes' deposition, it just seems to me that it is a little late to be imposing sanctions for that.

Thank you, your Honor.

The Court: All right. Mark it submitted.

Opinion and Order of Judge Metzner
Dated January 10, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Filed Jan 11 1974

61 Civ. 2324

#40204

[SAME TITLE]

METZNER, *D.J.*:

Plaintiff moves to review the action of the Clerk in taxing costs in favor of the defendant.

The total costs taxed by the Clerk against Trans World Airlines (TWA) was $1,941,639.15. The defendant Hughes Tool Company (Toolco) agrees that $69,186 was improperly charged against TWA for quarterly audits and thus the total cost taxed should have been $1,872,453.15.

I find that the charge of one-half of one per cent per annum interest ($1,015,625), which in reality was a commitment fee on the $75,000,000 letter of credit issued by the Bank of America is a proper cost to be taxed against the plaintiff. The charge is similar to the premium paid for a supersedeas bond.

The taxation of $66,040.40 to cover charges incurred in connection with security for the letter by Toolco is disallowed. Such costs must be borne by the defendant.

The charges of Haskins & Sells in the amount of $617,765 for the quarterly audits must be disallowed as taxable costs. These audits were accepted by the court at the re-

quest of the defendant as a less drastic but more costly form of protection of the judgment recovered by the plaintiff. It is perfectly clear from the proceedings in the spring of 1970 that Toolco was most interested in conducting business as usual. 314 F. Supp. 94 (S.D.N.Y. 1970). Since the defendant needed and was using millions of dollars to buy a hotel and an airline, and making alterations to hotels at the time it was called on to bond the judgment, it should bear the cost of allowing business to go on as usual.

The $173,022.75 taxed as costs at the district court level is proper. This case is not akin to those where claims and counterclaims are disposed of in the same trial.

Plaintiff is entitled to a setoff for costs of $4,602.65 regarding the Hughes deposition.

So ordered.

Dated: New York, N.Y.
January 10, 1974

CHARLES M. METZNER
U.S.D.J.

Notice of Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Civ. 2324

TRANS WORLD AIRLINES, INC.,

Plaintiff,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants.

Notice is hereby given that SUMMA CORPORATION (formerly known as HUGHES TOOL COMPANY) and RAYMOND M. HOLLIDAY, defendants in the above entitled action, appeal to the Court of Appeals for the Second Circuit from so much of the opinion and order entered in this action by Honorable Charles M. Metzner, United States District Judge, on January 10, 1974, Opinion No. 40204, which disallowed $683,805.40 of the defendants' claim for costs previously awarded by the Clerk of the United States District Court, Southern District of New York, on October 16, 1973, Judgment No. 73,840, and which awarded TRANS WORLD AIRLINES, INC. a setoff in the sum of $4,602.65.

Dated: New York, New York
February 7, 1974.

DAVIS & COX
/s/ By MAXWELL E. COX
A Member of the Firm
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To: CAHILL GORDON & REINDEL, ESQS.
Attorneys for Plaintiff
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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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TRANS WORLD AIRLINES, INC.,

Plaintiff-Appellee,

-against-

Docket No. 74-1243

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants-Appellants.

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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

DANNY M. PEPITONE, being duly sworn, deposes and says:

That deponent is not a party to the action, is over 18 years of age and resides at 224 West 13th Street, New York, New York.

That on the 20th day of May, 1974, deponent served the within APPENDIX to the Brief filed in the above captioned matter upon Cahill Gordon & Reindel, at 80 Pine Street, New York, New York, by delivering true copies thereof to them personally. Deponent knew the persons so served to be the persons mentioned in said papers as Attorneys for Plaintiff-Appellee.

Danny M. Pepitone

Danny M. Pepitone

Sworn to before me this
28th day of May, 1974.

Grace H. Gashezjiki

Notary Public